TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915

No. 70

ROBERT MOODY AND SON, A COPARTNERSHIP COMPOSED OF ROBERT MOODY AND THOMAS F. MOODY, APPELLANTS,

vs.

CENTURY SAVINGS BANK.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED FEBRUARY 16, 1916.

(24,057)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 364.

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vs.

CENTURY SAVINGS BANK.

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Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit at the December Term, 1913, of said Court, before the Honorable William C. Hook and the Honorable Walter I. Smith, Circuit Judges, and the Honorable Arba S. Van Valkenburgh, District Judge.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

Attest:

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to-wit: on the third day of June, A. D. 1912, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the Southern District of Iowa, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit in a certain cause wherein Century Savings Bank is Appellant and Robt. Moody and Son, et al., are Appellees, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

1 Citation.

In the District Court of the United States, Southern District of Iowa, Central Division.

In Re Estate of Oscar M. Hartzell, Bankrupt.

#1938, Bankruptcy.

United States of America—Sct. to Robt. Moody and Son—Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to an order allowing and granting an appeal filed in the Clerk's office of the District Court of the United States, Southern District of Iowa, Central Division, wherein the Century Savings Bank is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the said Century Savings Bank, appellant, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Smith McPherson, Judge of the District Court of the United States, Southern District of Iowa, Central Division, this 25th day of May, A. D. 1912.

SMITH McPHERSON,
Judge.

We hereby accept, admit and acknowledge due, legal and timely service of the foregoing citation this 29 day of May, A. D. 1912.

MULVANEY & MULVANEY,
S. F. PROUTY,
Solicitors for Robt. Moody and Son.

Filed May 31st, 1912. Wm. C. McArthur, Clerk. By Hattie Blank, Deputy.

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2 Waiver of Homestead.

In the United States District Court Southern District of Iowa, Central Division.

In the matter of Oscar M. Hartzell, Bankrupt.

In Bankruptcy.

Whereas I Oscar M. Hartzell, bankrupt, claimed in schedules attached to my petition in voluntary bankruptcy filed August

1st, A. D. 1908, in the office of the Clerk of the District Court of the United States for the Southern District of Iowa, Central Division, a right of [hom-stead] in the following described real estate situated in the County of Madison, State of Iowa, to-wit: The East Half (E. ½) of the Southeast Quarter (SE. ¼) of Southeast Quarter (SE. ¼) of Section Fifteen (15) and the West Half (W. ½) of the Southwest Quarter (SW. ¼) of the Southwest Quarter (SW. ¼) of Section Fourteen (14) all in Township Seventy-seven (77) North of Range Twenty-six (26) West of the 5" P. M. Madison County, Iowa.

Now we, the said Oscar M. Hartzell and Daisy F. Hartzell his wife, hereby waive any and all homestead right title claim and interest we have in said above described real estate or had at the time of the institution of proceedings in bankruptcy, and hereby surrender unto Frank L. Hall, A. F. Brown, and L. J. Klemm, Trustees in Bankruptcy of the said Oscar M. Hartzell said above described real estate that they may take possession
of the same for the benefit of all of the creditors of said
3 Oscar M. Hartzell, and apply the same or the proceeds thereof to the payment of the indebtedness of the said Oscar M. Hartzell owing to his several creditors.

Dated this 14" day of October A. D. 1908.

(Sgd) OSCAR M. HARTZELL,
DAISY F. HARTZELL.

4 State of Iowa,
Polk County—ss.

Be it remembered that on this 14" day of October A. D. 1908, before me personally appeared Oscar M. Hartzell and Daisy F. Hartzell his wife, to me known to be the persons named in and who executed the above and foregoing [insttument,] and acknowledged that they executed the same as their voluntary act and deed.

Witness my hand with Notarial Seal attached at Des Moines, Polk County, State of Iowa, the day and year first above written.

(Seal) (Sgd) A. E. CHILDS,
Notary Public in and for Polk County, Iowa.

Endorsed: Filed Oct. 17, 1908. S. S. Ethridge, Referee.

5 Petition to Sell Real Estate Free From Liens, and for Order Prescribing Notice to Lien Holders.

To the Honorable Smith McPherson, Judge of the District Court of the United States: For the Southern District of Iowa:

Now: come Frank L. Hall: L. J. Klemm and A. F. Brown: and respectfully represent that they are the trustees of the estate of Oscar M. Hartzell: Bankrupt: who was adjudged by this court to be in bankruptcy on the 1st day of August: 1908; upon his voluntary petition: and that subsequent to the said adjudication of bankruptcy the above named Frank L. Hall: L. J. Klemm and A. F. Brown: were elected as trustees, accepted the trust and qualified as such: and have ever since been: and are now: acting as such trustees.

Your trustees represent to the court that at the time of the adjudication in bankruptcy said Oscar M. Hartzell: Bankrupt: was possessed of the following described real estate: situate in Madison County: Iowa: to-wit:

All of Sections Fourteen (14): except school house site; the East Half (E ½) of Section Fifteen (15): the Northeast Quarter (NE ¼) of the Southwest Quarter (SW ¼) and the South Half (S ½) of the Southeast Quarter (SE ¼) of Section Ten (10): all in Township Seventy-seven (77) North of Range Twenty-six (26): West of the 5th P. M. Iowa: containing about 1080 acres:

6 and that the title to said lands by operation of law is now vested in the aforesaid trustees in bankruptcy; that said above described real estate has been appraised as required by law and said appraisement is now on file in the office of the Referee of this court.

Your trustees further represent to the court that one R. A. Crawford as admr. of the estate of Emma G. Johnson, dec'd. claims to hold a mortgage on the following described tract of said real estate, to-wit:

All of Section Fourteen (14) except school-house site, and the East Half (E½) of Section Fifteen (15):

in the sum of Thirty-Three Thousand (33:000) Dollars and interest; that the said mortgage was originally given on the 1st day of March; 1904: in the sum of $35:000: $2:000 of which has been paid; that the same was filed for record in the office of the Recorder of Deeds in Madison County, Iowa: on the 7th day of March: 1904: and is of record in the Mortgage Record of said County.

That the Valley Savings Bank: a corporation organized under the laws of the State of Iowa, as a savings bank: and doing business in Des Moines: Polk County: Iowa: claims to hold a mortgage upon the following described tract of real estate: to-wit:

The Northeast (¼) of the Southwest ¼: and the South ½ of the Southeast ¼ all in Section 10: in said township and range:

in the sum of Four Thousand (4,000) Dollars and interest.

That the Century Savings Bank: a corporation organized under the laws of the state of Iowa as a savings bank: and doing business in Des Moines, Polk County: Iowa:, 7 claims to hold a mortgage on all of the aforesaid real estate, in the sum of Nineteen Thousand Five Hundred Thirteen and 50/100 Dollars ($19:513:50) and interest: dated June 11: 1908 filed for record on June 13: 1908 in the office of the Recorder in Madison County: Iowa: and recorded in Book 48: page 397 of Mortgages.

That Robt. Moody & Son: a [co-partmership] doing business at Canadian: Hemphill County: State of Texas: and the members thereof residing in the said town of Canadian: claim to hold a mortgage on the said premises in the sum of Nineteen Thousand Twenty-Three and 55/100 Dollars ($19:023.55) and interest; said mortgage being dated on the 23d day of March: 1908: acknowledged on the 23d day of March: 1908: and filed for record on the 19th day of March: 1908: in the office of the Recorder of Madison County: Iowa: and recorded in Book 48 Page 387: and to hold a mortgage upon said premises in the sum of Nineteen Thousand Twenty-three and 55/100 Dollars: dated March 23: 1908: filed for record April 20, 1908 in the office of the recorder, Madison County, Iowa; and recorded in Book 44 of Mortgages page 250: and your petitioners aver that the said two mortgages to Robert Moody & Son were given to secure the same claim.

That each of the aforesaid mortgages except the two mortgages to the said Robt. Moody & Son are signed and acknowledged by the bankrupt: Oscar M. Hartzell and his wife: Daisy M. Hartzel;

That one L. Oliver residing in Madison County, Iowa, claims a mechanics lien on a part of said premises, to-wit: all of Section 14 except school house [cite]: and the East one-half (½) of Section 15; said mechanics' lien being filed in [in] the office of the Clerk of the District Court of Madison County: Iowa: on the 7th day of February: 1908: and said L. Oliver

claims to hold a mechanics' lien upon said premises;
8 Section 14 and the East ½ of Section 15 in the sum of $97.72. which lien was filed in the office of the Clerk of the District Court Madison County: Iowa: on the 14th day of May: 1908; that the said last named lien has been foreclosed by an action in equity in the District Court of Madison County: Iowa: petition for which was filed on the 9th day of September: 1908; that a decree was entered thereon on the 31st day of October; 1908: and that sale has been had under the said decree on an execution issued thereon to the defendant L. Oliver: all of said premises purporting to be covered by said lien; and that the said Oliver is now the holder of the said certificate of sale.

That the said Iowa Farmers Protective Mutual Hail Insurance Association; a corporation organized under the laws of the State of Iowa and doing business in the city of Des Moines: Polk County: Iowa: recovered a judgment against this bankrupt: Oscar M. Hartzell in the sum of $211.09 and interest and $20.59 attorneys' fee on the 27th day of January 1908: a transcript of which said judgment was filed in the office of the Clerk of the District Court of Madison County, Iowa, on the 9th day of October: 1908: and duly entered in docket "K" of the Records of the District Court of said County at page 214 thereof.

That on the 6th day of December: 1909 the Treasurer of Madison County: Iowa: sold for taxes the undivided 99/100 part of said Section 14: and the East ½ of Section 15: to one W. T. Guiner who is now the owner of said purchase certificate No. 977: said sale being in the sum of $217.71.

That Simon Casady & Co. a co-partnership doing business in Madison and Warren Counties: Iowa: the members of which are Simon Casady: residing in Polk County:
9 Iowa: and J. N. Casady residing in Warren County, Iowa: on June 23: 1908: sued out an attachment in the Madison County Iowa District Court and levied the same on all the real estate described herein; that said levy is junior to all the other liens herein set out.

That Daisy Hartzell is the wife of the said bankrupt: Oscar M. Hartzell, and was and has been ever since and long before his adjudication as a bankrupt; and the said Daisy Hartzell claims an inchoate right of dower in all of said lands;

That these trustees further represent to the court that in order to properly administer the estate of said Oscar M. Hartzell: Bankrupt: it is necessary to sell the above described real estate free from all liens or claims, and to marshal the

liens thereon and they further represent that this court on the 31st day of December: 1909: made an order authorizing and directing these trustees to sell all of said real estate; together with all other real estate belonging to said bankrupt's estate; at either public or private sale as these trustees might be advised: free from all liens: or subject to all valid liens as they might be able to sell to the best advantage for said estate; that in pursuance of said order and on the 4th day of February: A. D. 1910: they mailed to each creditor scheduled or filing claims: a notice: of the time and place when and where said real estate above described would be sold; that on the 20th day of September: A. D. 1910 these trustees sold to Joseph Meade of Iowa City: Iowa: the following described part of said real estate: to-wit:

All of Section 14 except school house site; the East ½ of Section 15,

the same to be free and clear of all liens and [in-
10 cumbraces,] and all taxes to be paid up to and including the taxes for the year 1910, for the sum of $64,253.00, that being the highest and best bid obtainable therefor; that they reported said sale to the court and said sale was by the Honorable Smith McPherson, Judge of said court, duly approved, and your trustees would further represent that it is to the best interest of this estate that all of said real estate be sold free from liens.

Wherefore, your trustees would respectfully pray that an order may be entered fixing a time for the hearing of this petition and prescribing the notice to be given to the said parties above named claiming liens against the said above described real estate, as to the time and hearing of this application, commanding said parties claiming to hold liens on said real estate, or any portion thereof or

to these trustees to set up by answer if they have not done so, what claims if any, they may have against said real estate as hereinbefore described; that such further orders as the court may deem necessary may issue to the aforesaid trustees in bankruptcy of the said Oscar M. Hartzell relative to the matter of the sale of the above described real estate to the end that said real estate be sold free from all liens and claims and free from the dower interest of the said Daisy M. Hartzell, and that the funds arising from the sale of said real estate be put into court for further orders, and that

it be decreed and ordered that the liens and claims of
11 each of the aforementioned persons who claim to hold liens, or other claims be cancelled, and be decreed to not be liens upon the said premises, that the liens of the creditors

be marshalled, and that the proceeds of the sale of said real estate be held by the trustees subject to the adjudication of this court and for the payment of said liens in the order in which they are established, and that the sale of said premises under the mechanic's lien of foreclosure as aforesaid be declared null and void and said attachment be declared null & void and that said sale & attachment be set aside and held for naught, and that these trustees may have all other relief as may be necessary and proper in the premises.

(Sgd) FRANK L. HALL,
L. J. KLEMM,
A. F. BROWN,
Trustees of the Estate of Oscar M. Hartzell, bankrupt.

(Sgd) J. M. PARSONS,
Attorney for Trustees.

State of Iowa,
So. Judicial Dist.
Polk County—ss:

A. F. Brown, being sworn, deposes and says that he is one of the Trustees in the foregoing matter of application to sell real estate that he has heard the same read, knows the contents thereof and that the matters and things therein set out are true and that he is acquainted with the facts set out in said petition.

(Sgd) A. F. BROWN.

12 Subscribed to and sworn to before me this 17" day of November, 1910.

(Seal) (Sgd) L. S. ELLIOTT,
Notary Public.

Endorsed: Filed November 28/10. Wm. C. McArthur, Clerk.

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13 Answer of Century Savings Bank.

To the Hon. Smith McPherson, Judge of said Court:

Par. 1. Comes now the Century Savings Bank, and for answer to the petition of the trustees filed herein of date November 28th 1910, seeking authority to sell the real estate situated in Madison County, Iowa, belonging to said bankrupt's estate, free and clear of liens, respectfully shows to the Court:

Par. 2. Taxes: For answer this defendant admits that all unpaid taxes on said real estate constitute a first lien thereon, prior and paramount to its interest therein, hereinafter set

forth. As to the amount of such unpaid tax, if any, it has neither knowledge [or] information sufficient to form a belief, and asks that due proof thereof be required.

Par. 3. Emma G. Johnson Mortgage: It admits that Emma G. Johnson, or her estate now represented by the administrator, holds or held a mortgage upon a part of said real estate as alleged in said petition; and further admits that said mortgage, to the extent of the unpaid balance thereon, if the same has been duly filed as a claim against said estate, is paramount and superior to the interest of this defendant in said premises. As to the amount of such unpaid balance, if any, it has neither knowledge [or] information sufficient to form a belief,
14 and asks that due proof thereof be required.

Par. 4; Valley Savings Bank Mortgage: It further admits that the Valley Savings Bank holds or held a mortgage upon the remainder of said real estate, as alleged in said petition; and further admits that said mortgage, to the extent of the unpaid amount thereon, if the same has been duly filed as a claim against said estate, is paramount and superior to the interest of this defendant in said premises. As to the extent of said unpaid amount, if any, it has neither knowledge [or] information sufficient to form a belief, and asks that due proof thereof be required.

Par. 5; Robert Moody and Son Claim: It denies that the defendant, Robert Moody and Son, has any mortgage upon, or interest in, said real estate, or any part thereof.

And for further answer this defendant alleges that any pretended mortgage that said Moody and Son may claim to have upon that part of said real estate which constituted the homestead of the bankrupt, a definite description of which homestead is hereinafter contained, and is shown by the record herein, is null and void under the statutes of Iowa (Code of 1897, § 2974), for that the said Daisy Hartzell, wife of said bankrupt, did not join in the execution thereof.

Par. 6; Iowa Farmers protection Mutual Hail Insurance Association Judgment: For further answer this defendant says said judgment, if a lien upon said real estate, is junior and inferior to the interest of this defendant therein, a transcript of the said judgment having been filed in said Madison county at a date subsequent to the execution and recording of this defendant's mortgage thereon.

As to the said homestead of the bankrupt this defendant denies that said judgment, if any, constitutes a lien thereon.

15 Par. 7; Simon Casady and Co. Attachment: For further answer this defendant says: that the attachment lien of Simon Casady and Co. upon said premises is junior and inferior to its interest therein, said attachment having been levied at a date subsequent to the execution and recording of this defendant's mortgage thereon. Said attachment, if any, does not constitute a lien upon said homestead of the bankrupt.

Par. 8; Oliver Mechanic's Lien: And for further answer to said petition, this defendant admits that one L. Oliver established a mechanic's lien upon said premises, as stated in the petition, and that in the orderly prosecution of said cause, said premises were sold, and the sheriff's certificate issued to said Oliver; that subsequent to the execution of said sheriff's certificate, and on August 1st 1910, this defendant, for full value, to-wit: one hundred fifty-seven & 55/100 dollars ($157.55) in hand paid to the said Oliver, purchased from him all his rights arising thereunder, and because thereof is entitled to the lien upon and interest in said premises formerly held by the said Oliver.

That the petitioners herein, in their capacity or trustees of said bankrupt, were duly and regularly made parties defendant in said cause, and were regularly and duly served with summons or original notice therein.

Par. 9. Century Savings Bank Mortgage: For further answer this defendant further respectfully represents: that it is a creditor of said bankrupt, and duly filed its claim herein under date of September 22, 1908, all of which will more fully and at length appear from reference to its said claim, and the record herein, the same by this reference thereto being prayed to be taken as a part hereof.

Par. 10. That to secure payment of said indebtedness, the bankrupt, together with his said wife, on the 11th day of June, 1908, made, executed, acknowledged and delivered to this
16 defendant their certain mortgage, conveying the real estate in controversy herein, which said mortgage was duly recorded in said Madison County, Iowa, on the 13th day of June, 1908, as alleged in the petition; that because thereof this defendant acquired an interest, in said premises, to-wit: a mortgage lien thereon, dating from the recording of said mortgage, to-wit: June 13, 1908, and the same takes rank as to priority in the order herein set out.

Par. 11: That at the time of the execution of said mortgage, for a number of years prior thereto, and at all times since, the bankrupt was and is a married man, and the head of a family,

and a resident of Iowa, and forty acres of said real estate, to-wit: east half (½) of southeast quarter (¼) of southeast quarter (¼) of section fifteen (15), the west half (½) of southwest quarter (¼) of southwest quarter (¼) of section fourteen (14); all in township seventy-seven (77) north, range twenty-six (26), west of 5th p. m., Madison County, Iowa; constituted his homestead.

Par. 12: For further answer, this defendant admits that petitioners are the trustees in bankruptcy of said [bankrupt.s] estate, but avers that their interest, as such, in said real estate, is subject to the said mortgage lien of this defendant thereon. And this defendant further respectfully represents that this Honorable Court is without power or jurisdiction to make any order authorizing the trustees to sell said homestead, and is without power to make any orders affecting same other than to determine the boundaries thereof, and setting same apart to the bankrupt, with leave to creditors to prosecute their liens against the same in the State courts.

Par. 13: And this defendant further avers that, as against this defendant, the trustees have no interest in that part of said real estate which constitutes the homestead of the bankrupt, the adjudication of bankruptcy having the effect of transferring to them the title to the non-exempt property of the bankrupt only, and not including his homestead. This defendant
17 does not now, however, and never has, objected to the sale of said real estate free and clear of liens; provided that the order for such sale shall reserve and protect to this defendant its interest in said real estate, as herein stated; that prior to such order, or as a part thereof, the same should provide for the appraisal of said real estate, the homestead to be appraised separate distinct from the remainder thereof, or that the appraisal already so made, if any, should be taken in lieu thereof; and any sale of said premises should be without prejudice to the rights of this defendant to assert its mortgage lien upon and interest in the proceeds arising from said sale, to the same extent, and with the same force and effect that its mortgage lien, and its other interest herein stated now rests upon said premises, and the proceeds of said sale should be impressed with the mortgage lien and the mechanic's lien of the defendant in the premises, to the same extent that its said interest now exists in said premises; and in the event that it shall be found advisable to sell said homestead in connection with all or any part of the remainder of said real estate, that then and in that case the mortgage lien of this defendant thereon shall attach to and be impressed upon the proceeds thereof, with the same force and effect as the same now exists upon and against said homestead.

Wherefore, This defendant prays that, if said premises shall be sold free and clear of liens, the proceeds arising from said sale of that part thereof excluding the homestead be kept separate and distinct from the remainder of such proceeds.

That out of said proceeds arising from the sale of said premises, not including the homestead, there should first be paid the expenses of administration.

That there be next paid therefrom the taxes on said premises remaining due and unpaid, including those for the year 1910.

That out of the proceeds of the real estate covered by the mortgage of the Valley Savings Bank said mortgage be paid.

18 That out of the proceeds of the real estate covered by the mortgage of Emma G. Johnson, not including the homestead, her said mortgage be paid.

That out of the remainder of said assets this [defendsnt's] mortgage be paid; and if the same shall not be sufficient to make payment in full thereof, that all of the proceeds arising from the sale of said homestead be applied thereon, and the general creditors be denied participation therein.

And in the event that there shall be any funds in the hands of the trustees which shall be regarded as general assets of the estate, and in no manner pledged for the payment of any part of its indebtedness, and in the further event that the claims of this defendant shall not be paid in full, that then and in that case it be allowed to participate to the extent of such unpaid remainder, with the general creditors in the distribution thereof.

And this defendant prays for all such other, further and different relief as to equity may pertain, and as in duty bound it will ever pray, etc.

DALE & HARVISON,
PER HARVISON,
Solicitors for Century Savings Bank.

State of Iowa,
Polk County—ss.

I, L. E. Stevens, being first duly sworn, on oath state:

That I am the president of the Century Savings Bank, defendant above named, that the contents of the foregoing answer are known to me, and the facts therein stated are true, as I verily believe.

(Signed) L. E. STEVENS.

Subscribed and sworn to by the said Stevens, before me and in my presence, this 5th day of January, 1911.

(Seal) (Signed) W. G. HARVISON,
Notary Public in and for Polk County, Iowa.

Endorsed: Filed Jany. 6/11. Wm. C. McArthur, Clerk. By Hattie Blank, Deputy.

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19 (Order Granting Petition of Trustee to Sell Real Estate.)

Be it remembered that the above entitled matter came on for hearing before the District Court of the United States, Southern District of Iowa, Central Division, on the 30th day of June, 1911, at the court room of the United States District Court in Des Moines, Iowa, at 9 o'clock A. M., on the petition of Frank L. Hall, L. J. Klemm and A. F. Brown, Trustees of the estate of Oscar M. Hartzell, Bankrupt, for the sale of

All of Section Fourteen (14) except schoolhouse site; the East Half (E. ½) of Section Fifteen (15); the Northeast Quarter (N. E. ¼) of the Southwest Quarter (S. W. ¼) and the South Half (S. ½) of the Southeast Quarter (S. E. ¼) of Section Ten (10), all in Township Seventy-seven (77), North of Range Twenty-six (26), West of the 5th P. M. Iowa, containing about 1080 acres.

And the court having examined the notice of this hearing and the proof of service thereof, finds:

That notice as prescribed by the order of this Court on the 13th day of June, 1911, of the hearing upon this application has been given to each of the creditors of the bankrupt, by mailing more than ten days prior to this hearing by the referee, to their respective addresses as they appear in the list of creditors of the bankrupt, and as they appear as afterwards filed with the papers in this bankruptcy proceeding; and also in the same manner to each of the creditors claiming liens
20 upon the said premises, to-wit: R. A. Crawford, as administrator of the estate of Emma G. Johnson, deceased; Valley Savings Bank; the Century Savings Bank, Robert Moody & Son; L. Oliver; F. L. Groesbeck; Farmers Mutual Hail Insurance Association of Iowa; Simon Casady & Company; and Daisy Hartzell, the wife of the bankrupt, and that in addition to such service of said notice by mail, each of the foregoing named creditors claiming liens upon said real estate, or an interest therein, have duly, in writing, accepted service of notice of this hearing, except Robert Moody & Son and L. Oliver, and the said notice was, on the 19th day of June 1911, duly served on said Robert Moody & Son by the United States

[Marshall] in the Federal District of Texas, in which the said Robert Moody & Son have their principal place of business, and in which each member of said firm resides; and as to the said L. Oliver, the lien formerly claimed by him is evidenced by a certificate of sale now owned and held by the Century Savings Bank above named.

And it appearing to the Court that none of the creditors of the said bankrupt and none of the aforesaid lien claimants have appeared to this proceeding, or filed answer therein or objection to said sale being ordered; and it further appearing that it is to the best interests of the creditors of the said estate that the real estate aforesaid be sold free from liens and the claims of all other persons other than the said trustees, and that all the liens and claims against said premises shall be transferred to the fund arising from the sale of said premises.

It is Therefore Ordered, Adjudged and Decreed by the Court: That said Trustees sell at private sale in such lots as they shall determine, all of the aforesaid real estate, and that said sale when so made shall divest the liens and claims of all persons whomsoever to said real estate or any portion thereof, and the purchaser or purchasers of said premises or any portion thereof from said Trustees shall acquire and take title thereto free and clear from the liens or claims of all persons
21 whomsoever in and to said premises or any portion thereof, and the respective liens or claims of all persons whomsoever in, to, or upon said premises, are hereby removed from said premises and all portions thereof, and are hereby transferred to the funds derived from the sale of said premises by said Trustees, and that the funds arising from said sale be held by the said Trustees subject to the payment of whatever liens or claims may be established against said funds or any part thereof, and the costs of these proceedings, and to be distributed in accordance with the order of the court.

(Signed) SMITH McPHERSON, Judge.

July 5, 1911.

Endorsed: Filed July 5/11. Wm. C. McArthur, Clerk.

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22 Exceptions of Century Savings Bank to Conclusions of Law, and Proposed Decree.

To the Honorable, the Judges of Said Court:

Comes now the Century Savings Bank, by Dale & Harvison, its solicitors, and respectfully objects and excepts to the Conclusions of Law, found by this honorable Court, and the Proposed Decree conformable thereto and based thereon, and

respectfully shows to this Honorable Court the following grounds therefor:

First: This Honorable Court, sitting as a Court of Bankruptcy, having determined the homestead of the bankrupt to be of the extent or value of the sum of Eight Thousand Dollars ($8,000.00) was and is without jurisdiction to make and enter any order, judgment or decree with respect thereto, except to set out or turn over said sum to this exceptor, it claiming the same as the transferee, to-wit: the mortgage of the bankrupt and his wife; and this honorable Court is in error in overruling this exceptor's plea to the jurisdiction of this honorable Court, thus sitting as a Court of Bankruptcy, which plea is contained and set up in its, (exceptor's) answer to the petition of the Trustees for leave and power to sell the real estate in controversy, including said homestead, free and clear of liens and incumbrances, which said answer was duly filed herein of date January 10, 1910, and which said answer is hereby made and prayed to be taken as a part hereof.

Second: The mortgage to this exceptor, conveying said homestead, was duly filed for record June 13, 1908, and
23 as shown by the record herein. The status of this exceptor with respect to said homestead became vested and fixed thereby. No subsequent action of the bankrupt, had or taken by the bankrupt after adjudication of bankruptcy on August 1st, 1908, and without the knowledge or consent of exceptor, could in any wise prejudice such status. This honorable court was and is in error, therefore, in holding that the subsequent waiver of the homestead, executed by the bankrupt, of date October 14, 1908, without the knowledge or consent of this exceptor, extinguished and ended the homestead right, and deprived this exceptor, as such transferee or mortgage thereof, to set up and claim the same, and such holding deprives this exceptor of its rights and equities in the premises, and is opposed to the holdings of the courts of Iowa, and the law of Iowa, by which exceptor's said rights and equities are determined.

Third: Under the law of Iowa, Code of 1897, Section 2976, it is specially provided, that where a homestead, with other lands, is conveyed by mortgage, the homestead can not be sold at foreclosure or execution sale under such mortgage, except for and "only for a deficiency remaining after exhausting all other property pledged by the same contract (mortgage) for the payment of the debt." The land conveyed by the Johnson mortgage, excluding the homestead, having sold for a sum much more than sufficient to discharge said Johnson mortgage [illegible] Moody & Son having or holding no mortgage or lien

upon the homestead, such homestead, or its proceeds should then have been applied to, and on the payment of exceptor's mortgage, and this honorable Court erred in its conclusion of law to the contrary.

Fourth: The doctrine of marshalling assets is never applied except where it can be done without injustice or prejudice to the creditor against whom it is invoked. The application of such doctrine in this case is greatly to the prejudice of exceptor in that it takes from exceptor the sum of $5,052.63, upon which it had a mortgage lien, leaving exceptor with an unpaid balance on its claim of about $15000.00, and turns
24 said sum of $5052.63 over to Moody and Son who at no time had any lien of any kind thereon. This honorable court is in error, therefore, in thus marshalling the assets, not only because, sitting as a court of bankruptcy it had no jurisdiction so to do, but for the additional reason that, under the facts as found by the court, the doctrine of marshalling assets does not obtain.

Fifth: In marshalling the assets, no part of the proceeds of the homestead should have been applied on the Johnson or first mortgage, but all of the proceeds of the homestead should have been awarded to this exceptor, as second mortgagee, and this honorable Court erred in its conclusions of law to the contrary.

Sixth: As between this exceptor and Moody & Son, this exceptor held a mortgage lien upon said homestead, and its proceeds, and Moody & Son held no lien thereon. This honorable Court, therefore was in error in so marshalling assets as to take from exceptor the sum of $5052.63, of the proceeds of said homestead, upon which it had a mortgage lien, and giving same to Moody & Son, who had no lien thereon.

Respectfully submitted,

CENTURY SAVINGS BANK,
DALE & HARVISON,
per Harvison, Its Solicitors.

Endorsed: Filed May 15th, 1912. Wm. C. McArthur, Clerk. By Hattie Blank, Deputy.

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25 Findings of Fact and Conclusions of Law.

This case as to the matters and things in these findings and conclusions recited was fully argued by counsel and submitted to the court, and by the court taken under advisement, on the .... day of November 1911. Now at this time, the Court being fully advised, makes the following findings of fact:

1. The bankrupt, Oscar M. Harzell, in the year 1908, and for some years prior thereto had been and was a resident and citizen of Madison County, Iowa, which county is within this division and district. And while thus a resident and citizen, he was, on his own petition, erroneously stated by the Master as filed August 8, 1908, adjudicated a bankrupt by this Court on August 1, 1908.

2. August 1, 1908, and for some time prior thereto and at all times since, the said Hartzell was and still is a married man, he and his wife living together as husband and wife.

3. At the time of his adjudication as a bankrupt, the said Hartzell was the owner of considerable land and personal property, a part of which land is described as follows, viz.:

All of Section fourteen (14), being 640 acres, and the East Half of Section fifteen (15), being 320 acres, to be known and designated in these findings as the Meade Land. And 120, acres in Section Ten (10), to be known in these findings as the LAughlin land; all of which land was in township seventy-seven (77), Range twenty-six (26), Madison County, Iowa. All of said land was heavily mortgaged, covered by valid [mortgages] in no way voidable under the bankrupt law.

4. At the time of his adjudication the homestead of said Hartzell, where he and wife and family resided for quite a period of time, and where they resided for a time after the adjudication, was the forty acres of land, one half of which was the southwest twenty acres of said section fourteen, and the other twenty acres was the southeast twenty acres of said section fifteen, being a tract of forty acres square, on which forty acres were the residence, barns and other things necessary to make a home.

5. The first mortgage lien resting on and against said section fourteen and the east half of section fifteen, including said homestead, was, when paid off by order of this court in this proceeding, approximately for the sum of $40,000.00. That mortgage was signed, joined and concurred in by both Hartzell and his wife, as mortgagors of the same joint instrument. And the mortgage was at once placed of record in the county recorder's office, which mortgage was to a Mrs. Emma Johnson as mortgagee. She has since died, and her estate is represented by Mr. Crawford as administrator. Said mortgage was executed and recorded, as were all mortgages herein mentioned before the bankruptcy proceedings.

6. The said Hartzell and wife executed a mortgage to the Valley Savings Bank for $4000.00 on the 120 acres hereinreferred to as the Laughlin land, which mortgage was duly executed on the 1st day of March 1907 and at once recorded.

7. The next mortgage in point of time, executed by Oscar M. Hartzell alone, was in favor of Robert Moody & Son, as part collateral for approximately the sum of $86,000.00. of which there still remains unpaid approximately the sum of $17,000.00. That mortgage, on its [fact,] purported to convey all of the lands in section fourteen and all of the east half of section fifteen and the 120 acres in section ten, making in the aggregate 1080 acres, which purported to include the forty acre homestead a part of said tract, as aforesaid recited. Daisy F. Hartzell, wife of Oscar M. Hartzell, did not sign, join nor concur in the said mortgage to Moody & Son. The Moody mortgage was at once filed for record as provided by the Iowa laws.

8. After the making and recording of the three mortgages aforesaid, and at a later period, June 11, 1908, and duly recorded June 13, 1908, Hartzell gave a mortgage to secure the Century Savings Bank of Des Moines, Iowa of an indebtedness approximately the sum of $19,513.50. The wife signed, joined in and concurred in the same joint instrument or mortgage. That mortgage was duly recorded.

9. All of said mortgages were to secure an actual indebtedness and were made and placed of record at once when executed.

10. After the adjudication in bankruptcy, this court, with the bankrupt, the trustees of the estate, and all of said mortgagees, and all of the creditors before it, all consenting to and acquiescing in, entered a decree directing the said trustees to sell all of said 1080 acres of land free from all liens and encumbrances of any and all kinds, by perfect title, and that said liens and all of them, should rest on, and be liens against the proceeds of said sales, with the same and like effect, neither less nor greater, that said liens had theretofore, and in the same order as against said lands. Pursuant to said decree the said trustees did sell to one Joseph Meade, for $64,253.00, which said sale was approved by this court on July 5th, 1911, which said purchase price was received by the trustees. And the 120 acres in said section ten were by said trustees sold to T. F. Laughlin for $6,000.00, which said sale was by this court approved July 15th, 1911. Deeds were made

and approved, conveying said lands to Meade and Laughlin respectively.

The said indebtedness and liens as aforesaid, have been fully paid off by the said trustees, except the one to Moody & Son and the one to the Century Savings Bank.

11. A mechanic's lien, labor claims, and a number of other preferred claims have all been paid off in full. There will be no moneys to pay to general creditors, but the said general creditors must be paid, if at all, out of other assets of the estate. All court costs have been paid, including the commissions and expenses of the referee, trustees, attorneys' fees and all other matters about which there could be any contention and which are not longer material in this case.

After paying all of the foregoing, the trustees have in their possession from said sales of said lands, the sum of $13,683.94 to be applied on the claims of Robert Moody & Son and the Century Savings Bank, which amount is not sufficient to pay in full both or either of said claims.

2. While all of the lands thus sold to Meade were sold him as one tract of 960 acres, yet as a fact, the homestead forty acres as thus included, was of the value of $8,000.00 at time of sale, and was included in the grand total of $64,253.00
29 paid for the entire tract. And all of the parties in open court agree that the said homestead was worth $8,000.00, and which amount was received by the trustee by reason of the sale of the homestead, with the other lands.

13. October 14, 1908, the said Oscar M. Hartzell and his wife Daisy F. Hartzell, signed and delivered an instrument in writing by which they and each of them did surrender to the trustees of this estate the said forty acres or homestead tract aforesaid, authorizing and empowering the said trustees to treat the said homestead forty acres as part of the property of this bankrupt estate, the same as the non-exempt property of the estate. And that instrument was at once placed of record in the county recorder's office, the office provided by law for recording instruments affecting real estate. And after Meade and Laughlin had made their purchases, but as a part of the same transaction, the said Hartzell and wife conveyed all of their interest in said land to said Meade and Laughlin respectively. And except as to the application of the moneys now on hand, no one now asserts any rights to said homestead forty acres. Neither Hartzell nor his wife make any claims on account of the homestead. But each of them agrees that the money received from the sale of the homestead may be treated as other funds of the estate. This [leave] it to the court, how-

ever, to make application and distribution of the money, as the foregoing facts may acquire.

14. When this Court took jurisdiction of and made orders relative to said lands it was believed that there existed equities of considerable sums for creditors other than lien holders and those having preferred claims. But the trustees, after long continued and repeated efforts, wholly failed to secure sales for the said lands at prices sufficient to pay the preferred claims and those secured by liens on the lands.

30 15. It has not been claimed at any time that either the Moody & Son mortgage or the Century Savings Bank mortgage could be or should be avoided as unlawful preference. But the case has been treated and submitted to the court as presenting the only question as to those mortgages as a question of priority and marshalling the proceeds.

31 By reason of the foregoing facts the Court adopts the following as

Conclusions of Law.

1. The Iowa statutes allow the head of a family forty acres of land (outside of a town or city) and all buildings thereon as a homestead, regardless of value. Such a homestead is liable for the debts of the debtor, the head of the family in this case Oscar M. Hartzell, only to the extent:

A.

Such debts as were created prior to the acquisition of the homestead. In this case there are no such debts.

B.

When the debt is secured by mortgage covering the homestead, and such mortgage is but one instrument and signed by both husband and wife. Code 1897, Section 2974.

2. In the case at bar, Mrs. Johnson's mortgage for $40,580.-83 was a first and valid lien on the entire tract of 960 acres, including the homestead forty acres. And the said mortgage was carried forward and continued to be the first and valid lien on the entire fund of $64,253.00 realized from the sale of said 960 acres of land sold to Meade.

3. If said Johnson mortgage had been foreclosed, and said lien enforced as against Hartzell and wife, when occupying the homestead, with Moody & Son and the Century Savings Bank as junior lien-holders, parties defendants, there would and should have been a decree that the 920 acres would have been first sold

to satisfy the mortgage lien, and any deficiency only taken by sale of the homestead forty acres.

4. But such result as stated in conclusion 3 would only have been decreed, if Hartzell and wife had pleaded such
32 fact of the said forty acres being the [homstead,] and such being the fact. In the absence of such fact being pleaded, the decree would have been that the entire 960 acres would be sold to satisfy such debt to Mrs. Johnson.

5. In this case Mr. and Mrs. Hartzell abandoned their homestead and by conveyance relinquished their homestead and thereby consented to this court taking jurisdiction of and over the homestead forty acres, and on and after such [abondonment,] such homestead rights were at an end.

6. When this court did thus take and acquire jurisdiction of and over all of said lands, and did direct the sale thereof, and the same was sold to Meade for $64,253.00, the Johnson mortgage rested on the entire sum, and proportionately on $8,000.00 realized from the homestead.

The court concludes and holds that the $8,000.00 received from and on account of the sale of the homestead, should proportionately be used to pay off the Johnson mortgage; proportionately to the entire sum received from the sale of 960 acres. So that the court holds that $5052.63 of the proceeds of the sale of the homestead should be applied on the Johnson mortgage, and the balance from the sale of the other 920 acres, viz: $35,528.20.

The conclusion is that $5052.63 of the homestead money should be applied on the Johnson mortgage. This leaves $2947.27 to be otherwise applied.

8. The Moody mortgage was next in point of time. The Century Savings Bank mortgage was executed after the execution and recording of the Moody mortgage.

9. The Moody mortgage was void as to the homestead forty acres, because Hartzell alone signed it, his wife not
33 joining. But it was a valid lien, and junior only to the Johnson mortgage, on the remaining 920 acres. Code 1897, section 2974.

10. The Century Saving Bank mortgage, signed by both Hartzell and wife, was and is prior to the Moody mortgage as to the homestead forty acres, and the money realized therefrom. And as a conclusion of law, the holding is that the Century Savings Bank will be paid $2,947.27.

11. The balance of the money on hand will be paid to Moody & Son, viz: $10,736.67.

Done and ordered of record this May 24, 1912.

(Sgd) SMITH McPHERSON,
Judge.

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34 In the District Court of the United States, Southern District of Iowa, Central Division.

In the matter of the estate of Oscar M. Hartzell, a bankrupt.

No. .....

Decree.

This case was heretofore fully argued and submitted to the Court on the report of the Master and the exceptions thereto, and on all the evidence and records of the case, and was by the Court taken under advisement.

The motion of Century Savings Bank for an order to direct Crawford, administrator of estate of Johnson, deceased, is withdrawn.

And now at this time, the Court being advised, makes findings of fact and adopts conclusions of law, and the same are now ordered of record and are made a part of this decree. And although the Court in large part concurs with the Master as to the facts, and in part does not, the said report of the Master is set aside. The exceptions of Century Savings Bank to said conclusions of law are overruled.

Pursuant to the findings of the Court and the conclusions now made of record, it is ordered, adjudged and decreed that the trustees of this estate pay to S. F. Prouty, the attorney of record for Moody & Son, and for the benefit of Moody & Son, the sum of $10,736.67, which check will be countersigned by a judge of this Court. It is further ordered, adjudged and decreed that the trustees pay to W. G. Harvison, the attorney of record for the Century Savings Bank, and for the use and benefit of the Century Savings Bank, the sum of $2,947.27. Each party excepts.

Thereupon the Century Savings Bank in open Court gives notice of appeal. But as in any event the Century Savings Bank concedes that Moody & Son will be entitled to receive the

sum of $5,683.94, said sum will be paid on account to
35 Moody & Son by check signed by trustees and countersigned as aforesaid, payable to said Prouty for use of Moody & Son.

Done in open Court this May 24, 1912.

SMITH McPHERSON,
Judge.

Endorsed: Filed May 24, 1912. Wm. C. McArthur, Clerk. By Hattie Blank, Deputy.

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36 Petition of Century Savings Bank for Allowance of Appeal.

To The Honorable, The Judges of Said Court:

Comes now the Century Savings Bank, by Dale & Harvison, its solicitors, and conceiving and believing itself injured by the order, judgment and decree of this honorable Court made and entered in the above entitled matter and cause on the 24th day of May, 1912, wherein and whereby among other things it was ordered, adjudged and decreed that the proceeds of the sale of the real estate of the bankrupt, including the homestead should be so marshalled as that out of the proceeds of the homestead, to-wit: the sum of $8,000.00, the sum of $5062.63 would be applied upon the payment of the Johnson or first mortgage, and the same paid directly by the Trustees to Moody & Son, thereby giving to Moody & Son said sum of $5,052.63 upon which they had no lien, and taking from petitioner said sum of $5052.63, upon which it had a lien, leaving an unpaid balance on its claim against the bankrupt to the extent of $15,000.00 or more; and that the exceptions of petitioner to the Conclusions of Law found by this honorable Court, and to said order, judgment and decree be each and all overruled, does hereby appeal from said order, judgment and decree to the honorable United States Circuit Court of Appeals for the Eighth Circuit, for the reasons specified in the assignment of errors, which is filed herewith; and the petitioner prays the appeal may be allowed, and that the transcript of
37 the record, proceedings and papers upon which said order, judgment and decree was made, duly authenticated, may be sent to and filed with the said honorable United States Circuit Court of Appeals for the said Circuit.

CENTURY SAVINGS BANK,
DALE & HARVISON,
Per Harvison, Its Solicitors.

Order Allowing Appeal.

The foregoing petition for the allowance of an appeal is hereby granted, and the claim for appeal therein made, is allowed.

Done in open court, this 25 day of May, 1912.

(Signed) SMITH McPHERSON,
District Judge, and Judge of said United States District Court, presiding therein.

Endorsed: Filed May 25, 1912. Wm. C. McArthur, Clerk. By Louis J. Adelman, Deputy.

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38 Assignment of Errors.

Comes now the Century Savings Bank, by Dale & Harvison, its solicitors, and respectfully makes and files the following assignment of errors, upon which it will rely:

First: The Court erred in holding with respect to the homestead and its proceeds, that it had jurisdiction, while sitting as a Court of Bankruptcy, to make and enter final order other than to direct the Trustees to pay or turn over said proceeds to said bank to be applied upon its mortgage on said homestead.

Second: The Court erred in holding that it, sitting as a Court of Bankruptcy, had jurisdiction to include the proceeds of the homestead among the assets of the bankrupt, and marshall and distribute same, as between Moody & Son and said bank.

Third: The Court erred in holding that the proceeds of the homestead of the bankrupt constituted a part of the bankrupt's estate, and was subject to marshalling and distribution among his creditors.

Fourth: The Court erred in overruling each and all of the exceptions and objections of the bank to the jurisdiction of the Court, sitting as a Court of Bankruptcy, with respect to the marshalling and distributing the proceeds of the homestead.

Fifth: The Court erred in holding that the waiver of the homestead right, made by the bankrupt long subsequent to the recording of the mortgage to the bank, and without its
39 knowledge or consent, extinguished or ended the homestead right, and deprived the bank of its right to claim, under its mortgage, the exemption and benefit of said homestead right.

Sixth: The Court erred in failing and refusing to hold that the conveyance of the homestead, by the bankrupt and his wife, by said mortgage to the bank, vested the bank with the right to set up and claim the exemption of the proceeds of the homestead from application to the Johnson or first mortgage.

Seventh: The land, other than the homestead having sold for largely more than sufficient to discharge the Johnson or first mortgage, the Court erred in holding that the proceeds of the homestead, or any part thereof, should be diverted from the payment pro tanto of the bank's mortgage, which constituted a valid lien thereon, and turned over to Moody & Son, who had no lien thereon, leaving unpaid upon the bank's mortgage, a sum largely in excess of the amount so diverted.

Eighth: The Court erred in marshalling the proceeds of the homestead as a part of the assets of the estate of the bankrupt for distribution among his creditors other than said bank, the doctrine of marshalling of assets not being pertinent under the facts found by the Court.

Ninth: The Court erred in so marshalling the assets of the [bznkrupt,] including the proceeds of the homestead, as that a part of such proceeds was appropriated to the payment of the Johnson or first mortgage, and paid directly to Moody & Son, who had no lien thereon, and taken from the bank, which had a valid lien thereon, leaving the bank with an unpaid claim against the bankrupt and his estate, largely in excess of the amount so paid to said Moody & Son.

Tenth: The Court erred, in applying any part of the proceeds of the bankrupt's homestead in payment of the Johnson or first mortgage.

Eleventh: The Court erred in failing and refusing to
40 apply the whole of the proceeds of the bankrupt's homestead in part payment of the Bank's second mortgage.

Respectfully submitted,

CENTURY SAVINGS BANK,
DALE & HARVISON,
Per Harvison, Its Solicitors,

Endorsed: Filed May 25, 1912. at 8:35 A. M. Wm. C. McArthur, Clerk. By Louis J. Adelman, Deputy.

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41 (Bond on Appeal.)

Know All Men by These Presents:

That we, the Century Savings Bank of Des Moines, Iowa, and L. E. Stevens and B. B. Vorse are held and firmly bound,

unto Robt. Moody and Son, of Canadian, Texas, in the full and just sum of Five Hundred Dollars, to be paid to the said Robt. Moody and Son, their heirs, executors, administrators, successors or assigns, to which payment well and truly to be made, we bind our heirs, executors and administrators, successors or assigns, jointly and severally by these presents.

Sealed with our seals, and dated this 21st day of May, in the year of our Lord, One thousand nine hundred and twelve.

Whereas, lately at the May Term of the District Court of the United States for the Southern District of Iowa, Central Division, for the said year of our Lord, One thousand nine hundred and twelve, in a suit depending in said Court, entitled, In Re Estate of Oscar M. Hartzell, Bankrupt, #1938 Bankruptcy, wherein said Robt. Moody and Son were plaintiffs and said Century Savings Bank was defendant, decree was rendered against the said Century Savings Bank, and in favor of said Robt. Moody and Son, and the said Century Savings Bank has obtained an order granting to it an appeal from said decree of said Court to reverse the said decree in the aforesaid suit, and a [citizen] directed to the said Robt. Moody and Son, citing and admonishing them to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the
42 City of St. Louis, Missouri, sixty days from and after the date of said citation;

Now, the condition of the above obligation is such that if the said Century Savings Bank shall prosecute said appeal to effect, and answer all damages and costs if it fail to make good its plea then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of Century Savings Bank.

(Seal) By L. E. STEVENS, President,
(Seal) (Sgd.) L. E. STEVENS,
(Seal) " B. B. VORSE.

Approved by
(Sgd.) SMITH MCPHERSON, Judge.

Endorsed: Filed May 25, 1912. at 8:35 A. M. Wm. C. McArthur, Clerk. By Louis J. Adelman, Deputy.

43 Praecipe for Transcript.

Filed May 31st, 1912. Wm. C. McArthur, Clerk. By Hattie Blank, Deputy.

To the Hon. W. C. McArthur, Clerk of Said Court:

You will please prepare transcript of the record in the above entitled matter and cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Judicial Circuit, under the appeal heretofore perfected to said Court, and include in said transcript the following pleadings, proceedings and papers on file, to-wit:

1. The Petition of the Trustees for leave to sell the real estate of the bankrupt, free and clear of liens and incumbrances, filed herein November 28, 1910.

2. The Answer of the Century Savings Bank to said petition, filed herein January 6, 1911.

3. The Order of Court, granting said petition filed herein July 5, 1911.

4. The Waiver of Homestead, executed by the bankrupt, and filed herein Oct. 17, 1908.

5. The Findings of Fact, and Conclusions of Law and Decree of the Court deciding the controversy arising between the Century Savings Bank and Moody and Son, filed herein May 24, 1912.

6. The Exceptions of said Century Savings Bank to said Findings of Fact and Conclusions of Law, and Decree, filed herein May 15, 1912.

44 7. The Petition of said Century Savings Bank for allowance of Appeal herein, Order allowing Appeal, and Assignments of Error filed herein May 25, 1912.

8. The Bond on Appeal filed herein May 25, 1912.

9. The Citation filed herein May 31, 1912, with acknowledgments of service thereof endorsed thereon.

10. The Praecipe for Transcript filed herein May 31, 1912.

Said transcript to be prepared as required by law and the rules of this Court, and the rules of the United States Circuit Court of Appeals for the Eighth Circuit, and to be filed in the office of the Clerk of said Circuit Court of Appeals, at St. Louis, Missouri.

DALE & HARVISON,
Per Harvison,
Solicitors for Century Savings Bank.

45 (Clerk's Certificate to Transcript.)

United States of America,
Southern District of Iowa,
Central Division—ss.

I, Wm. C. McArthur, Clerk of the District Court of the United States, for the Southern District of Iowa, hereby certify the foregoing 44 pages to be a full, true and complete transcript of the record and proceedings as asked for by the praecipe for transcript filed, in the matter of the claim of the Century Savings Bank, Claimant, against Robert Moody & Son, as full, true and complete as the originals thereof now on file and of record thereof in my office in the City of Des Moines, in said District.

I further certify that the original Citation dated May 31, 1912, with acceptance of service thereon is hereto attached.

Seal
U. S. District Court,
Southern Dist.
of Iowa.

In Witness Whereof, I hereunto set my hand and affix the seal of said Court at my office in the City of Des Moines, in said District, this 1st day of June, A. D. 1912.

WM. C. McARTHUR,
Clerk as aforesaid.

Filed Jun—3, 1912. John D. Jordan, Clerk.

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46 Citation to Crawford, Admr.

United States of America—Sct. to Robt. Moody and Son and to R. A. Crawford, Admr. of the Estate of Emma G. Johnson, Deceased—Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to an order allowing and granting an appeal filed in the Clerk's office of the District Court of the United States, Southern District of Iowa, Central Division, wherein the Century Savings Bank is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the said Century Savings Bank, appellant, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Smith McPherson, Judge of the District Court of the United States, Southern District of

Iowa, Central Division, this 25th day of May, A. D. 1912.

SMITH McPHERSON,
Judge.

We hereby accept, admit and acknowledge due, legal and timely service of the foregoing citation this 1st day of June, A. D. 1912.

THOS. F. STEVENSON,
Solicitor for R. A. Crawford, Admr. as aforesaid.

Filed June 8th, 1912. Wm. C. McArthur, Clerk. By Hattie Blank, Deputy.

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47 Amended Certificate to Transcript of Record on Appeal.

I, Wm. C. McArthur, Clerk of the District Court of the United States for the Southern District of Iowa, hereby certify the above and foregoing to be a full, true and complete copy of the matters called for in the praecipe for a transcript of the record on appeal in the bankruptcy matter of Oscar M. Hartzell, being No. 1938 Central Division of the District Court of the United States for the Southern District of Iowa wherein the Century Savings Bank is Appellant and Robert Moody & Son, and R. A. Crawford, Administrator of the Estate of Emma G. Johnson, deceased, are Appellees, which is herewith transmitted to-gether with the original citations on appeal one accepted by Robert Moody & Son and one by R. A. Crawford, Admr as aforesaid.

Seal
U. S. Dist. Court,
Southern Dist.
of Iowa.

In Witness Whereof, I hereunto set my hand and affix the seal of said Court at my office in the City of Des Moines in said District this 17th day of July A. D. 1912.

WM. C. McARTHUR,
Clerk as aforesaid.

Filed Jul 18, 1912. John D. Jordan, Clerk.

~~48 SUPPLEMENTAL TRANSCRIPT ON WRIT OF ERROR.~~

50 Petition for Writ of Error.

To the Honorable, the Judges of Said Court:

Your petitioner, the Century Savings Bank, of Des Moines, Iowa, a corporation respectfully shows and represents that in ~~the above entitled cause and matter, pending in the District~~

(*Appearance of Counsel for Appellant.*)

United States Circuit Court of Appeals, Eighth Circuit.

No. 3793.

CENTURY SAVINGS BANK, Appellant,
vs.
ROBT. MOODY AND SON and R. A. CRAWFORD, Adm'r of Estate of Emma G. Johnson, Deceased.

The Clerk will enter my appearance as Counsel for the Appellant.

HORATIO F. DALE,
WILLIAM G. HARVISON,
Des Moines, Iowa.

(Endorsed:) Filed in U. S. Circuit Court of Appeals on June 12, 1912.

(*Appearance of Mr. S. F. Prouty as Counsel for Appellee, Robt. Moody and Son.*)

The Clerk will enter my appearance as Counsel for the Appellee, Robt. Moody and Son.

S. F. PROUTY,
Att'y for Robert Moody and Son.

(Endorsed:) Filed in U. S. Circuit Court of Appeals on August 14, 1912.

(*Appearance of Mr. Thomas F. Stevenson as Counsel for Appellee, R. A. Crawford, as Adm'r, etc.*)

The Clerk will enter my appearance as Counsel for the Appellee, R. A. Crawford, as Adm'r, etc.

THOS. F. STEVENSON.

(Endorsed:) Filed in U. S. Circuit Court of Appeals on August 15, 1912.

(*Order of Submission.*)

December Term, 1912.

Tuesday, December 17, 1912.

This cause having been called for hearing in its regular order, argument was commenced by Mr. William G. Harvison for appellant, continued by Mr. S. F. Prouty for appellees and concluded by Mr. Wm. G. Harvison for appellant.

Thereupon, this cause was submitted to the Court on the transcript of record from said District Court and the briefs of counsel filed herein.

(*Stipulation of Facts Relative to Johnson Mortgage.*)

It is agreed for the purpose of use in the trial of the above mentioned case that the notes and mortgage referred to in the record to Emma G. Johnson were of date March 1, 1904; that thirty thousand dollars of the amount found by the said District Court to be due thereon was by order of said court paid by the trustees herein on Oct. 5, 1911, and the balance found to be due thereon, to-wit, $10580.86, was paid by said trustees on Nov. 23, 1911.

It is further admitted that R. A. Crawford, the administrator of the estate of Emma G. Johnson was and is justly entitled to a sum equal to the amount of money he has received from the trustees of said estate by order of said District Court.

DALE & HARVISON,
Solicitor for Century Savings Bank.
S. F. PROUTY,
Solicitor for Robert Moody & Son.
THOS. F. STEVENSON,
Solicitor for R. A. Crawford, Adm'r.

(Endorsed:) Filed in U. S. Circuit Court of Appeals on December 18, 1912.

(*Opinion on Merits.*)

United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1912.

No. 3793.

CENTURY SAVINGS BANK, Appellant,
vs.
ROBT. MOODY AND SON and R. A. CRAWFORD, Adm'r of the Estate of Emma G. Johnson, Deceased, Appellees.

Appeal from the District Court of the United States for the Southern District of Iowa.

Mr. W. G. Harvison (Mr. Horatio F. Dale was with him on the brief), for appellant.

Mr. S. F. Prouty (Messrs. Mulvaney & Mulvaney were with him on the brief), for appellees.

Before Hook and Smith, Circuit Judges, and Van Valkenburgh, District Judge.

HOOK, Circuit Judge, delivered the opinion of the court.

This case involves the marshalling of the liens of three mortgagees. Omitting a number of facts which serve only to confuse,

the situation in its last analysis was this: The common debtor mortgaged to Johnson nine hundred and sixty acres of land in Iowa. Embraced in the land was his homestead of forty acres. He next mortgaged the nine hundred and twenty acres exclusive of his homestead to Moody. Then he mortgaged the whole nine hundred and sixty acres to the appellant, the Bank. Upon judicial sale the lands were so sold that the proceeds of the homestead and non-homestead portions were distinguishable. The total proceeds were more than enough to pay Johnson but the surplus was not enough for Moody and the Bank. As Moody had no lien on the homestead and the Bank had, the amounts they would receive depended on how Johnson, the first mortgagee, was paid—whether proportionately from homestead and non-homestead proceeds or entirely from the latter In other words, if Johnson with his first lien on two funds was paid in part from that which was not available to Moody it would operate pro tanto to the advantage of the latter and correspondingly to the disadvantage of the Bank The trial court adopted that plan. It directed payment to Johnson from the proceeds of the homestead and the non-homestead property proportionately. This enlarged the surplus in the latter fund for Moody by about $5,000.

If neither tract had been a homestead there would be precedent for the action of the court, Green v. Rumage, 18 Ohio 428, but the homestead element cannot be disregarded. The debtor and his wife expressly waived their homestead right and consented to the use of the proceeds in paying debts. The effect of this depends upon the state statute which created the right and prescribed its incidents and with respect to which the parties are held to have contracted. Section 2976 of the Iowa Code, 1897, provides that the homestead may be sold "for debts created by written contract, executed by the persons having power to convey, and expressly stipulating that it is liable therefor, but then only for a deficiency remaining after exhausting all other property pledged by the same contract for the payment of the debt." In Linscott v. Lamart, 46 Iowa 312, the holder of a mortgage upon both homestead and other property purchased the homestead and it was held he had the right, notwithstanding the purchase, to satisfy his claim out of the non-exempt property to the exclusion of junior liens. The sale by the debtor in that case was as complete an abandonment of all right and equity as the waiver and consent in the case at bar. At an early day in Wisconsin it was held that where a mortgage covered a homestead and also other property which was subject to a junior lien the debtor had no right to have the latter exhausted first to preserve his homestead. White v. Polleys, 20 Wis. 503. This decision led to a statute (Laws 1870 ch. 133) very similar to that of Iowa, and the case of Hanson v. Edgar, 34 Wis. 653, arose under it. There was a first mortgage upon 160 acres of land, forty acres of which was a homestead. A second mortgage upon the same land was void as to the homestead because not signed by the debtor's wife, but valid as to the remainder. Upon foreclosure the debtor and his wife made no claim. The second mortgagee insisted that the homestead on which he had

no valid lien should be first sold to pay the prior mortgage. He contended that the statute was only for the protection of the debtor and was not designed to affect equities between creditors and mortgagees when the debtor was not interested. The court held otherwise. In the later case of Smith v. Wait, 39 Wis. 512, the same rule was applied though the liens were acquired prior to the passage of the statute. The court held that the marshalling of liens according to equitable principles was not a vested right secure from legislative change. We think that in a case like the one at bar the provision of the Iowa statute that resort to the homestead shall be only for a deficiency is mandatory and is not affected by the act of the debtor and his wife after the mortgages are given.

The case below was in equity and is considered here on the appeal. The writ of error which was also prosecuted is dismissed.

The order of the District Court is reversed and the matter is remanded for further proceedings in conformity with this opinion.

Filed April 15, 1913.

(Decree.)

(The Decree of the Circuit Court of Appeals entered on April 15, 1913, was vacated and set aside on June 12, 1913, and is therefore omitted from this transcript.)

(Order: Motion to Set Aside Decree Granted, etc.)

May Term, 1913.

Wednesday, May 14, 1913.

This cause came on to be heard upon the motion of counsel for Appellees, Robt. Moody and Son, for an order to vacate and set aside the decree of this Court and for a finding of facts and conclusions of law.

On consideration whereof, it is now here ordered that said motion be granted, unless good cause to the contrary shall be shown by counsel for Appellant within ten days from and after this date.

May 14, 1913.

(Resistance to Motion to Vacate Decree.)

Comes now the Century Savings Bank, appellant above named, and objects to and opposes the motion of Robt. Moody and Son, appellees above named, and respectfully shows to this Honorable Court that said motion is based upon Rule 36 of General Orders in Bankruptcy. Section 3 of said rule 36 provides as follows:

"3. In every case in which either party is entitled by the act to take an appeal to the Supreme Court of the United States, the court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the facts, and its conclusions of law thereon, stated separately; and the record trans-

mitted to the Supreme Court of the United States on such an appeal shall consist only of the pleadings, the judgment or decree, the finding of facts, and the conclusions of law."

The grounds of appellant's objections and opposition to said motion of said appellees are:

1. Inasmuch as the decree complained of by said appellees was filed and entered in this Court on April 15, 1913, and no findings of facts and conclusions of law thereon was then or previously requested of this honorable Court, the right to request same has been waived and lost by said Robt. Moody and Son, Appellees, and cannot be resurrected or recreated at a date subsequent thereto.

2. This honorable Court is without jurisdiction or power to vacate the decree complained of, on the motion of said appellees, for the sole purpose of affording them a basis for an appeal, in the absence of a request for a finding of facts and conclusions of law thereon, made by them prior to, or at the time of, the entering of the decree complained of by appellees.

3. This Honorable Court is without jurisdiction or power to make an order sustaining said motion of said appellees, because more than thirty days have intervened since April 15, 1913, the date on which the decree complained of was entered. (Rule 36, Section 2).

4. This Honorable Court is without jurisdiction or power to now make and enter Findings of Fact and conclusions of Law.

5. The granting of said motion would be, in practical effect, an abrogation or repeal of said Rule 36, which rule was prescribed or enacted by the Supreme Court of the United States, to be observed generally in all cases, and the substitution therefor, by this Honorable Court, of a different and contradictory rule, to obtain specially in the instant case, the patent effect of which, and the sole ground of requesting which, is to relieve said appellees Moody and Son from the results of their failure to request Findings of Fact and Conclusions of Law, "at or before the time" this Honorable Court entered its judgment or decree herein.

All of which is respectfully submitted.

HORATIO F. DALE,
WILLIAM G. HARVISON,
(DALE & HARVISON),
Solicitors for Century Savings Bank, Appellant.

Des Moines, Iowa, May 17, 1913.

(Endorsed:) Filed in U. S. Circuit Court of Appeals on May 19, 1913.

(*Order: Decree of Circuit Court of Appeals Entered April* 15, 1913, *Vacated and Set Aside and Cause Continued under Advisement.*)

May Term, 1913.

Thursday, June 12, 1913.

Upon consideration of the motion of Robt. Moody and Son, one of the appellees, it is now here ordered that the decree of this Court

entered in this cause on the 15th day of April, 1913, be, and the same is hereby, vacated and set aside, and this cause is continued under further advisement.

June 12, 1913.

(*Motion of Robt. Moody and Son to Vacate Decree of Reversal and to Dismiss Appeal.*)

Now come the appellees, Robert Moody and Son, and respectfully state that this court is without jurisdiction upon appeal in this cause for the following reasons:

1. It appears from the record in this cause that this was a proceeding in bankruptcy in which this court is given jurisdiction to superintend and revise in matter of law only under the provisions of Section 24*b* of the Bankruptcy Act.

2. It appears from the record that this cause does not involve "controversies arising in bankruptcy proceedings" under Section 24*a* of the Bankruptcy Act, nor is it an appeal from a judgment allowing or rejecting a debt or claim of five hundred dollars or over under Section 25*a* (3) of the Bankruptcy Act.

Wherefore said appellees pray the court to vacate and set aside the decree of reversal heretofore entered herein by this court and to now enter a decree dismissing the appeal herein for the want of jurisdiction.

S. F. PROUTY,
N. P. WILLIS AND
GEO. F. HAID,
Counsel for Appellees, Robert Moody and Son.

* * * * * * *

(Here follows brief in support of foregoing motion.)

(Endorsed:) Filed in U. S. Circuit Court of Appeals on June 13 1913.

(Opinion on Motion to Dismiss Appeal.)

United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1913.

No. 3793.

CENTURY SAVINGS BANK, Appellant,
vs.
ROBT. MOODY & SON et al., Appellees.

Appeal from the District Court of the United States for the Southern District of Iowa.

Mr. Horatio F. Dale and Mr. W. G. Harvison for appellant.
Mr. S. F. Prouty, Mr. N. P. Willis and Mr. Geo. F. Haid for Robt. Moody & Son, appellees.

Before Hook and Smith, Circuit Judges, and Van Valkenburgh, District Judge.

HOOK, *Circuit Judge,* delivered the opinion of the Court.

This is a motion to dismiss the appeal of the Century Savings Bank from a decree of a district court as a court of bankruptcy upon the ground that the exclusive remedy was by petition to revise. The appeal had been argued, submitted and decided without suggestion by anyone that appellant should have come here by a different route. After our opinion had been handed down (Century Savings Bank v. Robt. Moody & Son, — C. C. A. —, 204 Fed. 963) and a decree had been entered in favor of appellant reversing the decree of the district court, the appellees requested us to set the decree aside and make findings of fact and conclusions of law according to General Order in Bankruptcy No. xxxvi, p. 3, to enable them to take the case to the Supreme Court. The General Order provides that the findings and conclusions be made at or before the entering of the decree. It is our practice not to anticipate a further appeal but to await request for findings and conclusions; and if the decree has then been entered, to vacate it so that the Order may be observed. Therefore, when appellees made their request the decree was vacated, but that being done they for the first time challenged the particular method by which this court had acquired cognizance and made the motion to dismiss.

Passing the matter of practice disclosed by the foregoing the question presented depends upon the character of the proceeding below from which the appeal was taken. By sec. 2, p. 7 of the bankruptcy act courts of bankruptcy have jurisdiction to "cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto." Sec. 24*a* gives circuit courts of appeals jurisdiction by appeal of "controversies arising in bankruptcy proceedings." By 24*b* they have jurisdiction in equity

to superintend and revise in matter of law proceedings in bankruptcy. Sec. 25*a*, which also relates to proceedings in bankruptcy or bankruptcy proceedings proper as distinguished from controversies, provides for appeals to the circuit court of appeals in three classes of cases, the third being "a judgment allowing or rejecting a debt or claim of five hundred dollars or over," but this case is not of that character.

The following conclusions may be drawn from the decisions of the Supreme Court: The presentation for allowance of a demand against a bankrupt's estate is a step in bankruptcy proceedings as to which appeal is specially provided by sec. 25. If both a demand and a lien to secure it be presented at the same time the procedure for the former dominates, the lien goes along as an incident, and the double presentation is also regarded as a step in the bankruptcy proceeding. To this effect are Coder v. Arts, 213 U. S. 223, and In re Loving, 224 U. S. 183. Of Hutchinson v. Otis, 190 U. S. 552, sometimes carelessly cited, the court said in Coder v. Arts: "The contest in the Otis case, as in this, was over the claim presented, and, incidentally, to establish a lien upon the bankrupt's estate." In none of the cases, however, has it been held that there cannot be an independent assertion of the lien alone so as to create a controversy appealable under sec. 24*a*. Knapp v. Milwaukee Trust Co., 216 U. S. 545, and Houghton v. Burden, 228 U. S. 161, are examples of controversies over liens. In the former, the trustee first petitioned for the sale of the bankrupt's property. A mortgagee then intervened "and asked to have the lien of the mortgage established as the first lien on the property and satisfied out of the proceeds of the sale. The property was sold and the question is as to the lien of these mortgages upon the fund." It was held this made an appealable controversy, not a bankruptcy proceeding. Houghton v. Burden, as explained by the report in the Court of Appeals, In re Canfield, 113 C. C. A. 562, 193 Fed. 934, also involved an independent assertion of a security or lien giving rise to a controversy appealable under sec. 24*a*. Coder v. Arts and In re Loving on the one hand and Knapp v. Milwaukee Trust Co. and Houghton v. Burden on the other are in entire harmony. Other instances of appeals in controversies over liens are Hurley v. Railway, 213 U. S. 126, 82 C. C. A. 453, 153 Fed. 503, and Merchants Nat. Bank v. Sexton, 228 U. S. 634, sub nom. In re Kessler, 108 C. C. A. 239, 186 Fed. 127, without discussion, however, of the particular appellate remedy. The latter case went to the Court of Appeals by both appeal and petition to revise and it does not appear which was entertained, but as sec. 25 did not apply and as there was a further appeal to the Supreme Court jurisdiction depended upon 24*a*, not 24*b*. Had it been a petition to revise under 24*b*, see Holden v. Stratton, 191 U. S. 115. Whether there is a controversy for appeal or a mere bankruptcy proceeding for petition to revise does not necessarily depend upon who first brought it about. For example, in the Knapp case which was held to be a controversy, the trustee petitioned that the property be sold and then the mortgagee appeared for the assertion of his lien.

Is this case a controversy arising in a bankruptcy proceeding within 24*a* or is it a bankruptcy proceeding under 24*b*? If the former, appeal is the remedy; if the latter, petition to revise. In our former opinion only those facts were recited which were necessary to present the question decided. It is now necessary to go further to determine the character of the proceeding in the district court. One Hartzell had been adjudged bankrupt. In his estate were 960 acres of land heavily encumbered with mortgage, judgment, attachment and tax liens. His homestead was included in this land and was claimed as such in his schedule, but the exemption was afterwards waived by him and his wife. The trustees in bankruptcy filed a petition that the land be sold free of all encumbrances, that the liens be marshalled and transferred to the proceeds, that a prior sale under a foreclosure of a mechanics' lien and also an attachment be declared null and void, and "that these trustees have all other relief as may be necessary and proper in the premises." The appellant, the Century Savings Bank, had a valid mortgage upon all of the land including the homestead. Moody & Son, the appellees, had a mortgage upon all of the land including the homestead, but as to the latter the wife of the bankrupt had not joined. The appellant Bank filed what it termed an answer in which it asked relief against not only the trustees but also the appellees. It set out in this pleading the various encumbrances and liens in detail, admitted some as superior to its mortgage, claimed that others were inferior, denied that the appellees had any mortgage or interest in any of the real estate, and alleged that their pretended mortgage on the homestead was null and void under the state statute because the bankrupt's wife had not joined. The appellant also denied the right of the trustees to the homestead and the jurisdiction of the court over it except to determine the boundaries and set it off to the bankrupt with leave to the creditors to prosecute their liens against it in the state courts; but said it did not object to the sale of the property provided its mortgage rights were protected and extended to the proceeds. It averred that it had filed its claim as a creditor of the bankrupt. The prayer was that if the property was sold free from the liens the proceeds be distributed in the order definitely specified by the appellant, those of the homestead to be kept separate, and that if there then remained a balance due appellant it should in respect thereof be allowed to participate with other creditors in the general assets and "for all such other and further relief as to equity may pertain." The pleading of the appellant, though styled an answer, was in substance an intervening petition claiming affirmative relief in respect of its lien against both the trustees and the appellees. The claim against the trustees, if it had any merit, which is doubtful, became immaterial as will presently be seen, and the real controversy was between appellant and appellees over the validity of appellees' mortgage and the priority of their respective liens. It is important to note that appellant was not asserting its mortgage lien as an incident to the presentation for allowance of its claim against the general estate as was the case in Coder v. Arts and In re Loving. So far as could be in the nature of

things there was a separate, independent assertion of its mortgage. The District Court ordered the sale of the lands and that the liens be transferred to the proceeds. The sale was made for a sum insufficient to pay the mortgages, all of which were prior to and unaffected by the bankruptcy proceedings. In other words, it became manifest nothing would be left for the general estate and it could be of no interest to the trustees or the general estate whether a deficiency of claim after the application of the proceeds of the mortgaged realty should be that of appellant or that of the appellees; so there was then disclosed a controversy in which the trustees had no real interest but which was between individual lien holders. The District Court then proceeded to try the issues between the appellant and the appellees. The appellant filed exceptions to the proposed findings of fact, conclusions of law and decree of the District Court; the exceptions were overruled and a decree was entered in favor of the appellees upon the matter in difference between them and the appellant. The nature of this decree appears from our former opinion.

The case has the substantial aspects of an independent controversy. There is a distinct alignment of parties, and pleadings unconnected with the ordinary assertion for allowance of a demand against the estate. The marshalling of liens is a substantive head of equitable jurisdiction. Appellant's pleading was in substance and form an intervention in equity. The trial court proceeded as in a plenary, independent controversy and called its conclusion a decree. To be sure, the property belonged to the bankrupt and was in the control of the trustees, but sec. 2 p. 7 and sec. 24*a* contemplate controversies over property so owned and situated. A controversy under 24*a* may be as to title, Hewit v. Berlin Machine Works, 194 U. S. 296, or as to lien, Knapp v. Milwaukee Trust Co., supra, but if the latter it should arise independently of the ordinary presentation for allowance of the claim it secures, Coder v. Arts, supra. This was a controversy under 24*a* and appeal, not petition to revise, was the proper remedy. The motion to dismiss is denied. The request for findings of fact and conclusions of law is also denied. General Order xxxvi does not apply. Knapp v. Milwaukee Trust Co., supra. The order setting aside the decree is vacated.

Filed December 11, 1913.

SMITH, *Circuit Judge,* concurring:

I concur in the foregoing opinion but in doing so attach weight to the fact that this was a controversy as to the proceeds of the homestead and so far as the matters here are concerned involved nothing else. The homestead was exempt under the laws of Iowa. Section 2972, Code of 1897. Under the circumstances the title to it did not pass to the trustee. Lockwood v. Exchange Bank, 190 U. S. 294; Ingram v. Wilson, 125 Fed. 913; In re Nye, 133 Fed. 33; In re O'Rear, 189 Fed. 88; Gregory v. Bristol, 191 Fed. 31; Huntington v. Baskerville, 192 Fed. 813.

The only jurisdiction the Court had in the bankruptcy proceeding proper was to set apart the exemptions. True the homestead was

mortgaged with other property which was subject to the bankruptcy proceeding but the entire property was mortgaged for more than it was worth. The general creditors had no claims against the homestead and the District Court as a court of bankruptcy had no jurisdiction to take the homestead into its possession because the general creditors had and could have no claims against it. The court of bankruptcy as such therefore had nothing whatever to do with the homestead except to assign or set it off. If the homestead or its proceeds ever further came within the jurisdiction of the District Court it was not in the bankruptcy case proper but in a controversy which arose therein.

The opinion of Judge Hook is exhaustive and is, I think, correct but I prefer to put my concurrence chiefly upon the grounds just stated.

Filed December 11, 1913.

(Order: Motion to Dismiss and Request for Findings of Fact and Conclusions of Law Denied, etc.)

December Term, 1913.

Thursday, December 11, 1913.

This cause came on to be heard upon the motion of Appellees, Robt. Moody and Son, to vacate the decree of reversal and to dismiss the appeal herein and was argued by counsel.

On consideration whereof, it is now here ordered by this Court that the motion to dismiss the appeal herein, be, and the same is hereby, denied; and that the request of said Appellees for findings of fact and conclusions of law under general order in bankruptcy No. 36, be, and the same is also hereby, denied.

It is further ordered that the order heretofore entered on the 12th day of June, 1913, vacating the decree in this cause, be, and the same is hereby, vacated and set aside, and it is now here ordered that the decree of this Court in pursuance of the opinion filed on April 15, 1913, be reentered this day.

December 11, 1913.

(*Decree.*)

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1913.

Thursday, December 11, 1913.

No. 3793.

CENTURY SAVINGS BANK, Appellant,
vs.
ROBT. MOODY AND SON, R. A. CRAWFORD, Adm'r of the Estate of Emma G. Johnson, Deceased.

Appeal from the District Court of the United States for the Southern District of Iowa.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Iowa, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the order and decree of the said District Court, in this cause, be, and the same is hereby, reversed with costs; and that the Century Savings Bank have and recover against Robt. Moody and Son, and R. A. Crawford, Ad'mr of the Estate of Emma G. Johnson, deceased, the sum of —— Dollars for its costs in this behalf expended and have execution therefor, except as against the said administrator.

It is further ordered that this cause be, and the same is hereby, remanded to the said District Court with directions for further proceedings in conformity with the opinion of this Court.

December 11, 1913.

(*Petition for Appeal, etc., to Supreme Court U. S.*)

Robert Moody & Son, a co-partnership composed of Robert Moody and Thomas F. Moody, appellees in the above entitled cause, feeling aggrieved because of the decision and decree of this Court entered herein on the 11th day of December, 1913, respectfully pray that an appeal may be allowed to them from such decree to the Supreme Court of the United States, and that a transcript of the record, proceedings and papers upon which said decision and decree was made, duly authenticated, may be sent to and filed with the said Supreme Court of the United States.

ROBERT MOODY & SON,
By S. F. PROUTY,
NEWTON P. WILLIS, AND
GEO. F. HAID, *Their Counsel.*

Appeal allowed in open Court this 27th day of January, 1914.

WALTER H. SANBORN,
Presiding Judge, U. S. Circuit Court of Appeals, Eighth Circuit.

(Endorsed:) Filed in U. S. Circuit Court of Appeals on January 27, 1914.

(Assignment of Errors on Appeal to Supreme Court U. S.)

Now come Robert Moody & Son, a co-partnership composed of Robert Moody and Thomas F. Moody, and respectfully state that the United States Circuit Court of Appeals for the Eighth Circuit erred in its decision rendered in the above entitled cause, and assign the following errors, to-wit:

1. The said Circuit Court of Appeals erred in holding that the proceeding in the District Court from which the appeal was prosecuted by the Century Savings Bank in this cause was an independent suit and, therefore, reviewable by appeal.

2. The said Circuit Court of Appeals erred in not holding that the proceeding in said District Court was a "proceeding in bankruptcy" and reviewable only upon petition and notice, under the provisions of Section 24*b* of the Bankruptcy Act.

3. The said Circuit Court of Appeals erred in not dismissing for want of jurisdiction the appeal of the Century Savings Bank from the decree of said District Court.

4. The said Circuit Court of Appeals erred in reversing the decree of said District Court entered May 24, 1912.

5. The said Circuit Court of Appeals erred in holding that under the provisions of Section 2976 of the Iowa Code of 1897, that resort to the homestead shall be only for a deficiency, is mandatory, and is not affected by the act of the debtor and his wife after the mortgages are given.

The said Robert Moody & Son pray that the decree of the United States Circuit Court of Appeals entered on the 11th day of December, 1913, may be reversed with costs, and that the Honorable Supreme Court of the United States may cause to be done what it may deem right and proper in the premises.

ROBERT MOODY & SON,
By S. F. PROUTY,
NEWTON P. WILLIS, AND
GEO. F. HAID, *Their Counsel.*

(Endorsed:) Filed in U. S. Circuit Court of Appeals on January 27, 1914.

(Bond on Appeal to Supreme Court, U. S.)

Know all men by these presents, that we, Robert Moody & Son, a co-partnership composed of Robert Moody and Thomas F. Moody, as principals and Southern Surety Company, as surety, are held and

firmly bound unto Century Savings Bank, a corporation organized and existing under the laws of the State of Iowa, in the full and just sum of Five Hundred Dollars ($500.00) to be paid to the said Century Savings Bank, its successors or assigns to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, successors or assigns, jointly and severally by these presents.

Sealed with our seals and dated this 24th day of January, in the year of our Lord, One Thousand Nine Hundred and Fourteen.

Whereas, lately at the December Term, 1913, of the United States Circuit Court of Appeals for the Eighth Circuit, in a suit pending in said Court, between Century Savings Bank, Appellant, and Robert Moody & Son, et al., Appellees, a decree was rendered against the said Robert Moody & Son, and the said Robert Moody & Son have obtained an appeal from the said Court to reverse the decree in the aforesaid suit, and a citation directed to the said Century Savings Bank citing and admonishing it to be and appear in the Supreme Court of the United States at Washington, D. C., thirty days from and after the date of said citation.

Now, the condition of the above obligation is such, that if the said Robert Moody & Son shall prosecute said appeal to effect and answer all damages and costs if they fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in the presence of

ROB'T MOODY & SON, [SEAL.]
By THOS. F. MOODY.
[SEAL.] SOUTHERN SURETY COMPANY,
By E. G. DANA, *Secretary.*

Approved January 27, 1914,
WALTER H. SANBORN,
Presiding Judge, U. S. Circuit Court of Appeals, Eighth Circuit.

(Endorsed:) Filed in U. S. Circuit Court of Appeals on January 27, 1914.

(Order Allowing Appeal to Supreme Court U. S.)

December Term, 1913.

Tuesday, January 27, 1914.

In the above entitled cause the Court having considered the petition of Robert Moody and Son, a copartnership, etc., for the allowance of an appeal to the Supreme Court of the United States from the decree of this Court, entered in this cause on the 11th day of December, 1913, it is now here ordered that the appeal as prayed be, and is hereby, allowed, and the appeal bond in the sum of Five Hundred Dollars is duly approved and a citation issued to the adverse party is signed this day.

(*Præcipe for Transcript on Appeal to Supreme Court U. S.*)

To the Clerk of said Court:

You will please prepare transcript on appeal to the Supreme Court of the United States in the above entitled cause, and include therein all of the record and proceedings.

S. F. PROUTY,
NEWTON P. WILLIS AND
GEO. F. HAID,
Counsel for Robert Moody & Son.

(Endorsed:) Filed in U. S. Circuit Court of Appeals on January 27, 1914.

THE UNITED STATES OF AMERICA:

To Century Savings Bank, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington, D. C., thirty days from and after the day this Citation bears date, pursuant to an appeal filed in the Clerk's office of the United States Circuit Court of Appeals for the Eighth Circuit wherein Robert Moody and Son, a co-partnership composed of Robert Moody and Thomas F. Moody, are appellants and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellants, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Walter H. Sanborn, Presiding Judge of the United States Circuit Court of Appeals for the Eighth Circuit this 27th day of January in the year of our Lord one thousand nine hundred and fourteen.

WALTER H. SANBORN,
Presiding Judge of the United States Circuit Court of Appeals for the Eighth Circuit.

We hereby admit service of the within citation this 29th day of January, 1914.

HORATIO F. DALE,
WM. G. HARVISON,
(DALE & HARVISON),
Counsel for Century Savings Bank.

[Endorsed:] No. —. Supreme Court of the United States, October Term, 1913. No. —. Robert Moody and Son, a copartnership, etc., et al., Appellants, vs. Century Savings Bank. Citation on Appeal. Filed Jan. 30, 1914. John D. Jordan, Clerk.

(Clerk's Certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Southern District of Iowa as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinions, had and filed in the United States Circuit Court of Appeals except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein the Century Savings Bank is Appellant and Robt. Moody and Son, et al., are Appellees, No. 3793, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that the original citation with admission of service endorsed thereon is hereto attached and herewith returned.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this fourth day of February, A. D. 1914.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No 24,057. U. S. Circuit Court Appeals, 8th Circuit. Term No. 364. Robert Moody & Son, a co-partnership composed of Robert Moody and Thomas F. Moody, appellants, vs. Century Savings Bank. Filed February 16th, 1914. File No. 24,057.

SUPREME COURT U. S.
FILED
FEB 16 1914
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. [redacted] 36[redacted] 70

ROBERT MOODY & SON, a Co-partnership composed of ROBERT MOODY and THOMAS F. MOODY,
Petitioners,
vs.
CENTURY SAVINGS BANK, a Corporation,
Respondent.
} In Equity.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

S. F. PROUTY, Washington, D. C.,
NEWTON P. WILLIS, Canadian, Texas,
GEO. F. HAID, St. Louis, Mo.,
Counsel for Petitioners.

St. Louis Law Printing Co., Printers' Bldg., Ninth and Walnut. Bell, Main 1819.

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SUPREME COURT OF THE UNITED STATES.

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} In Equity.

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Robert Moody & Son, a co-partnership composed of Robert Moody and Thomas F. Moody, respectfully show to this Court that it seems to your petitioners that a writ of *certiorari* ought to

issue in this cause for a review thereof by this Court on the following grounds, to-wit:

First. In the interests of jurisprudence and uniformity of decision between this Court and the said Circuit Court of Appeals, there being, as your petitioners believe, a substantial conflict of decision between said Circuit Court of Appeals and this Court upon a question of the jurisdiction of said Circuit Court of Appeals in a bankruptcy proceeding.

Second. That the said Circuit Court of Appeals entertained jurisdiction upon an appeal from the decree of the District Court in said cause, notwithstanding the fact that, as your petitioners believe, its jurisdiction to review such decree, under the decisions of this Court and the Judicial Code, was limited to a review upon a petition to revise under the provisions of Section 24 of the Bankruptcy Act.

Third. That the Circuit Court of Appeals erroneously held, as your petitioners believe, that the proceeding here involved was an independent suit, reviewable by appeal under the provisions of Section 24a of the Bankruptcy Act, and not a proceeding in bankruptcy reviewable under the provisions of Section 24b of the Bankruptcy Act, contrary to the decisions of this Court.

Fourth. There is a conflict between the decision of said Circuit Court of Appeals for the Eighth Circuit and the decisions of the Courts of Appeals for the Fourth, Fifth, Sixth, Seventh and Ninth Circuits.

Fifth. That there is involved in this case the construction of the Statutes of Iowa, as to the effect of which as applied to this case there is no authoritative decision of the court of last resort in that State, to-wit: Section 2976 of the Code of 1897, which provides,

among other things, that the homestead "may be sold for debts created by written contract, executed by the persons having power to convey, and expressly stipulating that it is liable therefor, but then only for a deficiency remaining after exhausting all other property pledged by the same contract for the payment of the debt", and which said Circuit Court of Appeals held is mandatory and not affected by the act of the debtor and his wife after the mortgages are given, and that notwithstanding the fact that the bankrupt and his wife surrendered in writing to the Trustees in Bankruptcy the homestead tract and authorized and empowered the said trustees to treat such homestead as part of the property of the estate, the same as non-exempt property of the estate, that the proceeds of the non-exempt property must be exhausted to discharge the first mortgage covering all the property, including the homestead, before any of the proceeds realized from the sale of the homestead could be applied thereto, although the second mortgage was a lien only upon the non-exempt property.

A sale was directed by the Court, the order providing, among other things (Transcript, p. 12), that the same be sold free and clear of all liens or claims "of all persons whomsoever in and to said premises or any portion thereof, and the respective liens or claims of all persons whomsoever in, to, or upon said premises, are hereby removed from said premises and all portions thereof, and are hereby transferred to the funds derived from the sale of said premises by said Trustees, and that the funds arising from said sale be held by the said Trustees subject to the payment of whatever liens or claims may be established against said funds or any part thereof, and the costs of these proceedings, and to be distributed in accordance with the order of the Court."

The District Court filed findings of fact and conclusions of law, as follows (Transcript, p. 15):

> **"Findings of Fact and Conclusions of Law.**
>
> "This case as to the matters and things in these findings and conclusions recited was fully argued by counsel and submitted to the Court, and by the Court taken under advisement, on the —— day of November, 1911. Now at this time, the Court being fully advised, makes the following findings of fact:
>
> "1. The bankrupt, Oscar M. Hartzell, in the year 1908, and for some years prior thereto had been and was a resident and citizen of Madison County, Iowa, which county is within this division and district. And while thus a resident and citizen, he was, on his own petition, erroneously stated by the Master as filed August 8, 1908, adjudicated a bankrupt by this Court on August 1, 1908.
>
> "2. August 1, 1908, and for some time prior thereto and at all times since, the said Hartzell was

and still is a married man, he and his wife living together as husband and wife.

"3. At the time of his adjudication as a bankrupt, the said Hartzell was the owner of considerable land and personal property, a part of which land is described as follows, viz:

"All of section fourteen (14), being 640 acres, and the east half of section fifteen (15), being 320 acres, to be known and designated in these findings as the Meade land. And 120 acres in section ten (10), to be known in these findings as the Laughlin land; all of which land was in township seventy-seven (77), range twenty-six (26), Madison County, Iowa. All of said land was heavily mortgaged, covered by valid (mortgages) in no way voidable under the bankrupt law.

"4. At the time of his adjudication the homestead of said Hartzell, where he and wife and family resided for quite a period of time, and where they resided for a time after the adjudication, was the forty acres of land, one-half of which was the southwest twenty acres of said section fourteen, and the other twenty acres was the southeast twenty acres of said section fifteen, being a tract of forty acres square, on which forty acres were the residence, barns and other things necessary to make a home.

"5. The first mortgage lien resting on and against said section fourteen and the east half of section fifteen, including said homestead, was, when paid off by order of this Court in this proceeding, approximately for the sum of $40,000.00. That mortgage was signed, joined and concurred in by both Hartzell and his wife, as mortgagors of the same joint instrument. And the mortgage was at once placed of record in the county recorder's office, which mortgage was to a Mrs. Emma Johnson as mortgagee. She has since died,

and her estate is represented by Mr. Crawford as administrator. Said mortgage was executed and recorded, as were all mortgages herein mentioned before the bankruptcy proceedings.

"6. The said Hartzell and wife executed a mortgage to the Valley Savings Bank for $4000.00 on the 120 acres herein referred to as the Laughlin land, which mortgage was duly executed on the 1st day of March, 1907, and at once recorded.

"7. The next mortgage in point of time, executed by Oscar M. Hartzell alone, was in favor of Robert Moody & Son, as part collateral for approximately the sum of $86,000.00, of which there still remains unpaid approximately the sum of $17,000.00. That mortgage, on its face purported to convey all of the lands in section fourteen and all of the east half of section fifteen and the 120 acres in section ten, making in the aggregate 1080 acres, which purported to include the forty-acre homestead a part of said tract, as aforesaid recited. Daisy F. Hartzell, wife of Oscar M. Hartzell, did not sign, join nor concur in the said mortgage to Moody & Son. The Moody mortgage was at once filed for record as provided by the Iowa laws.

"8. After the making and recording of the three mortgages aforesaid, and at a later period, June 11, 1908, and duly recorded June 13, 1908, Hartzell gave a mortgage to secure the Century Savings Bank of Des Moines, Iowa, of an indebtedness approximately the sum of $19,513.50. The wife signed, joined in and concurred in the same joint instrument or mortgage. That mortgage was duly recorded.

"9. All of said mortgages were to secure an actual indebtedness and were made and placed of record at once when executed.

"10. After the adjudication in bankruptcy, this Court, with the bankrupt, the trustees of the es-

tate, and all of said mortgagees, and all of the creditors before it, all consenting to and acquiescing in, entered a decree directing the said trustees to sell all of said 1080 acres of land free from all liens and encumbrances of any and all kinds, by perfect title, and that said liens and all of them, should rest on, and be liens against the proceeds of said sales, with the same and like effect, neither less nor greater, than said liens had theretofore, and in the same order as against said lands. Pursuant to said decree the said trustees did sell to one Joseph Meade, for $64,253.00, which said sale was approved by this Court on July 5th, 1911, which said purchase price was received by the trustees. And the 120 acres in said section ten were by said trustees sold to T. F. Laughlin for $6,000.00, which said sale was by this Court approved July 15th, 1911. Deeds were made and approved, conveying said lands to Meade and Laughlin respectively.

"The said indebtedness and liens as aforesaid, have been fully paid off by the said trustees, except the one to Moody & Son and the one to the Century Savings Bank.

"11. A mechanic's lien, labor claims, and a number of other preferred claims have all been paid off in full. There will be no moneys to pay to general creditors, but the said general creditors must be paid, if at all, out of other assets of the estate. All court costs have been paid, including the commissions and expenses of the referee, trustees, attorneys' fees and all other matters about which there could be any contention and which are not longer material in this case.

"After paying all of the foregoing, the trustees have in their possession from said sales of said lands, the sum of $13,683.94 to be applied on the claims of Robert Moody & Son and the Century

Savings Bank, which amount is not sufficient to pay in full both or either of said claims.

"12. While all of the lands thus sold to Meade were sold him as one tract of 960 acres, yet as a fact, the homestead forty acres as thus included, was of the value of $8,000.00 at time of sale, and was included in the grand total of $64,253.00 paid for the entire tract. And all of the parties in open court agree that the said homestead was worth $8,000.00, and which amount was received by the trustee by reason of the sale of the homestead, with the other lands.

"13. October 14, 1908, the said Oscar M. Hartzell and his wife, Daisy F. Hartzell, signed and delivered an instrument in writing by which they and each of them did surrender to the trustees of this estate the said forty acres or homestead tract aforesaid, authorizing and empowering the said trustees to treat the said homestead forty acres as part of the property of this bankrupt estate, the same as the non-exempt property of the estate. And that instrument was at once placed of record in the county recorder's office, the office provided by law for recording instruments affecting real estate. And after Meade and Laughlin had made their purchases, but as a part of the same transaction, the said Hartzell and wife conveyed all of their interest in said land to said Meade and Laughlin respectively. And except as to the application of the moneys now on hand, no one now asserts any rights to said homestead forty acres. Neither Hartzell nor his wife make any claims on account of the homestead. But each of them agrees that the money received from the sale of the homestead may be treated as other funds of the estate. This leaves it to the Court, however, to make application and distribution of the money, as the foregoing facts may require.

"14. When this Court took jurisdiction of and made orders relative to said lands it was believed that there existed equities of considerable sums for creditors other than lien holders and those having preferred claims. But the trustees, after long-continued and repeated efforts, wholly failed to secure sales for the said lands at prices sufficient to pay the preferred claims and those secured by liens on the lands.

"15. It has not been claimed at any time that either the Moody & Son mortgage or the Century Savings Bank mortgage could be or should be avoided as unlawful preference. **But the case has been treated and submitted to the Court as presenting the only question as to those mortgages as a question of priority** and marshalling the proceeds.

"By reason of the foregoing facts the Court adopts the following as

CONCLUSIONS OF LAW.

"1. The Iowa statutes allow the head of a family forty acres of land (outside of a town or city) and all buildings thereon as a homestead, regardless of value. Such a homestead is liable for the debts of the debtor, the head of the family, in this case Oscar M. Hartzell, only to the extent:

A.

"Such debts as were created prior to the acquisition of the homestead. In this case there are no such debts.

B.

"When the debt is secured by mortgage covering the homestead, and such mortgage is but one instrument and signed by both husband and wife. Code 1897, Section 2974.

"2. In the case at bar, Mrs. Johnson's mortgage for $40,580.83 was a first and valid lien on the entire tract of 960 acres, including the homestead forty acres. And the said mortgage was carried forward and continued to be the first and valid lien on the entire fund of $64,253.00 realized from the sale of said 960 acres of land sold to Meade.

"3. If said Johnson mortgage had been foreclosed, and said lien enforced as against Hartzell and wife, when occupying the homestead, with Moody & Son and the Century Savings Bank as junior lien-holders, parties defendants, there would and should have been a decree that the 920 acres would have been first sold to satisfy the mortgage lien, and any deficiency only taken by sale of the homestead forty acres.

"4. But such result as stated in conclusion 3 would only have been decreed if Hartzell and wife had pleaded such fact of the said forty acres being the homestead and such being the fact. In the absence of such fact being pleaded, the decree would have been that the entire 960 acres would be sold to satisfy such debt to Mrs. Johnson.

"5. In this case Mr. and Mrs. Hartzell abandoned their homestead and by conveyance relinquished their homestead and thereby consented to this Court taking jurisdiction of and over the homestead forty acres, and on and after such abandonment such homestead rights were at an end.

"6. When this Court did thus take and acquire jurisdiction of and over all of said lands, and did direct the sale thereof, and the same was sold to Meade for $64,253.00, the Johnson mortgage rested on the entire sum, and proportionately on $8000.00 realized from the homestead.

"The Court concludes and holds that the $8000.00 received from and on account of the sale of the homestead should proportionately be used to pay off the Johnson mortgage; proportionately to the entire sum received from the sale of 960 acres. So that the Court holds that $5052.63 of the proceeds of the sale of the homestead should be applied on the Johnson mortgage, and the balance from the sale of the other 920 acres, viz: $35,528.20.

"The conclusion is that $5052.63 of the homestead money should be applied on the Johnson mortgage. This leaves $2947.27 to be otherwise applied.

"8. The Moody mortgage was next in point of time. The Century Savings Bank mortgage was executed after the execution and recording of the Moody mortgage.

"9. The Moody mortgage was void as to the homestead forty acres, because Hartzell alone signed it, his wife not joining. But it was a valid lien, and junior only to the Johnson mortgage, on the remaining 920 acres. Code 1897, Section 2974.

"10. The Century Savings Bank mortgage, signed by both Hartzell and wife, was and is prior to the Moody mortgage as to the homestead forty acres, and the money realized therefrom. And as a conclusion of law, the holding is that the Century Savings Bank will be paid $2947.27.

"11. The balance of the money on hand will be paid to Moody & Son, viz: $10,736.67."

And the following decree was entered (Transcript, p. 21):

"This case was heretofore fully argued and submitted to the Court on the report of the Master and the exceptions thereto, and on all the evidence

and records of the case, and was by the Court taken under advisement.

"The motion of Century Savings Bank for an order to direct Crawford, administrator of estate of Johnson, deceased, is withdrawn.

"And now at this time, the Court being advised, makes findings of fact and adopts conclusions of law, and the same are now ordered of record and are made a part of this decree. And although the Court in large part concurs with the Master as to the facts, and in part does not, the said report of the Master is set aside. The exceptions of Century Savings Bank to said conclusions of law are overruled.

"Pursuant to the findings of the Court and the conclusions now made of record, it is ordered, adjudged and decreed that the trustees of this estate pay to S. F. Prouty, the attorney of record for Moody & Son, and for the benefit of Moody & Son, the sum of $10,736.67, which check will be countersigned by a judge of this Court. It is further ordered, adjudged and decreed that the trustees pay to W. G. Harvison, the attorney of record for the Century Savings Bank, and for the use and benefit of the Century Savings Bank, the sum of $2947.27. Each party excepts.

"Thereupon the Century Savings Bank in open court gives notice of appeal. But as in any event the Century Savings Bank concedes that Moody & Son will be entitled to receive the sum of $5683.94, said sum will be paid on account to Moody & Son by check signed by trustees and countersigned as aforesaid, payable to said Prouty for use of Moody & Son.

"Done in open court this May 24, 1912."

From this decree the Century Savings Bank prosecuted an appeal to the United States Circuit Court of Appeals for the Eighth Circuit, to which appeal the trustees in bankruptcy were not made parties.

A motion to dismiss the appeal for the want of jurisdiction was denied by the Circuit Court of Appeals for the Eighth Circuit, and the decree of the District Court was reversed and the cause was ordered remanded to that court for further proceedings.

An appeal in this cause having been prosecuted to this court, the petitioners pray that the transcript on such appeal may be taken and considered as the exhibit to this petition required by Section 3 of Rule 37 of the rules of this Honorable Court.

Wherefore, your petitioners respectfully pray that a writ of *certiorari* may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding the said court to certify and send to this court, on a certain day to be therein designated, a full and complete transcript of the record of all proceedings of the said Court of Appeals in the said case therein entitled Century Savings Bank, Appellant, v. Robert Moody & Son, *et al.*, No. 3793, to the end that the said case may be reviewed and determined by this court as provided in Section 6 of the Act of Congress, entitled "An act to establish Circuit Courts of Appeal and define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, and that your petitioners may have such other or further relief or

remedy in the premises as to this court may seem appropriate and proper.

And your petitioners will ever pray.

ROBERT MOODY & SON,
Petitioners,

By S. F. PROUTY,
NEWTON P. WILLIS,
GEO. F. HAID,
Their Counsel.

State of Missouri, } ss.
City of St. Louis. }

George F. Haid, being duly sworn, on his oath states that he is one of the attorneys for the petitioners in the above-entitled cause; that he has read the foregoing petition for writ of *certiorari*, and knows the contents thereof, and that the facts therein stated are true as he verily believes.

GEORGE F. HAID.

Subscribed and sworn to before me this 7th day of February, A. D. 1914.

My commission expires December 28, 1914.

FRANK A. MOHR,
(SEAL) *Notary Public Within and for the City of St. Louis, Missouri.*

I hereby certify that I am of counsel for the petitioners in this cause and that in my judgment the above petition for *certiorari* is well founded in point of law and fact and ought to be granted.

S. F. PROUTY,
Counsel for Petitioners.

BRIEF OF PETITIONERS.

JURISDICTION OF THE CIRCUIT COURT OF APPEALS.

The Judicial Code, which was in force at the time the appeal in this cause was prosecuted to the Circuit Court of Appeals for the Eighth Circuit, provides:

> "Section 130. The Circuit Courts of Appeals shall have the appellate and supervisory jurisdiction conferred upon them by the act entitled 'An act to establish a uniform system of bankruptcy throughout the United States,' approved July first, eighteen hundred and ninety-eight, and all laws amendatory thereof, **and shall exercise the same in the manner therein prescribed.**"

Previous to the adoption of the Judicial Code, this Honorable Court, in several cases, pointed out the distinction between "a proceeding in bankruptcy" and a "controversy arising in bankruptcy proceedings," and the appropriate procedure applicable to secure a review of each.

The respondent, in its brief in the Circuit Court of Appeals, stated that "the proceeding, in its essential facts, is quite similar to the First National Bank case, 198 U. S. 280."

That case **(First National Bank v. Chicago Title and Trust Co., 198 U. S. 280)**, which arose upon a petition of the trustee for authority to sell property which was alleged to be in the possession of the trustee, and of which, therefore, the District Court would have jurisdiction, was held to be a proceeding in bank-

ruptcy, and that appeal would not lie to the Court of Appeals.

In the instant case the trustees filed a petition for authority to sell all the property of the bankrupt, free and clear of all liens, and the lien holders (the validity of whose claims was not questioned) were, by order of the District Court, ordered to show cause why such order should not be granted.

The District Court, in paragraph 15 of its findings (Transcript, p. 19), states:

> "It has not been claimed at any time that either the Moody & Son mortgage or the Century Savings Bank mortgage could be or should be avoided as unlawful preference. **But the case has been treated and submitted to the court as presenting the only question as to those mortgages as a question of priority and marshalling the proceeds.**"

Although the proceeding was thus instituted and did not attack the validity of any of the claimed liens, and notwithstanding the decision of this Honorable Court in the case of Coder v. Arts, 213 U. S. 235, that the character of the proceeding is to be determined by the manner in which the jurisdiction of the Bankruptcy Court is invoked, and that its subsequent disposition and appropriate appellate jurisdiction are to be determined by the provisions of the Bankruptcy act governing bankruptcy proceedings, and although there was no controversy between the trustees and an adverse claimant, the said Circuit Court of Appeals held that the proceeding was an independent suit and, therefore, appealable.

The present case is much like that of **Snow et al. v. Dalton, 203 Fed. 843, 845** (decided by the Circuit Court

of Appeals for the Fourth Circuit), which that Court said

> "is the case of a dispute between parties to the bankruptcy proceedings as to their respective rights to participate in the proceeds of an admittedly valid security, and we hold belongs in the category of 'proceedings in bankruptcy.'"

The parties here, petitioners and respondent, had but a lien on the property. The legal title and possession was in the bankrupt at the time of the adjudication. The District Court, in passing upon the petition of the trustees, commanding the lien holders to show cause why such petition should not be granted, and in directing a sale of the property, was acting as a Court of Bankruptcy. It was exercising such authority in pursuance of the powers conferred upon it as a Court of Bankruptcy to collect the assets of the bankrupt, because, as is found by the District Court (page 19 of the transcript):

> "When this court took jurisdiction of and made orders relative to said lands it was believed that there existed equities of considerable sums for creditors other than lienholders and those having preferred claims."

The District Court was entirely justified in directing such sale because the creditors were entitled to any excess proceeds above the amount of the lien incumbrances. In its every action, therefore, the Bankruptcy Court was exercising the administrative authority conferred upon it by the Bankruptcy Act (Subd. 7 of Sec. 2), and this determined the character of the proceeding and "its subsequent disposition and the appropriate appellate jurisdiction are to be deter-

mined by the provisions of the bankruptcy act governing bankruptcy proceedings" (Coder v. Arts, *supra*) and not by the Court of Appeals Act with reference to appeals in equity.

The decision of said Circuit Court of Appeals for the Eighth Circuit is contrary also to the decisions of the Circuit Court of Appeals in the Fourth Circuit (in the cases of **Snow v. Dalton, 203 Fed. 843, 845**, and **Thompson v. Mauzy, 174 Fed. 611, 614**), Fifth Circuit (in the case of **Schuler v. Hassinger, 177 Fed. 119, 121, 123**), Sixth Circuit (in the cases of **In re Mueller, 135 Fed. 711, 714, 715**, and **Brady v. Bernard & Kittinger, 170 Fed. 576, 579**), Seventh Circuit (in the case of **In re Friend et al., 134 Fed. 778**), Ninth Circuit (in the case of **Morehouse v. Pacific Hardware & Steel Co., 177 Fed. 337, 339, 340**).

FOURTH CIRCUIT CASES.

In **Thompson v. Mauzy, 174 Fed. 611, 614**, that court, defining proceedings in bankruptcy, states:

> "The latter being confined to those questions arising between the bankrupt and his creditors which are the very subject of such administrative orders and judgments, from the petition for adjudication to the discharge, and including the intermediate administrative steps, and **such controversies as arise between parties to the bankruptcy proceedings** as are involved in the allowance of claims, fixing their priorities, sales, allowances, and other matters to be disposed of summarily."

In **Snow v. Dalton, 203 Fed. 843, 845**, the Court said:

> "This is the case of a dispute between parties to the bankruptcy proceedings as to their respective rights to participate in the proceeds of an

admittedly valid security, and we hold belongs in the category of 'Proceedings in Bankruptcy.' "

FIFTH CIRCUIT.

The case of **Schuler v. Hassinger, 177 Fed. 119, 121, 123**, was a case in which the trustees in bankruptcy petitioned the Court, just as in the case under consideration, for authority to sell all the property of the bankrupt free and clear of all mortgages, liens and encumbrances. An order was entered adjudicating and recognizing the nature, amount and character of the liens of certain creditors, and ordering the property sold free and clear of any and all liens and mortgages; said liens and mortgages to be shifted to the proceeds of the sale of the properties so mortgaged. In its opinion, the Court states:

"A motion has been made to dismiss the appeals because they are taken to review orders and decrees not within the scope of Section 25a of the Bankruptcy Act of 1898, nor are they appeals from orders and decrees in independent suits or controversies arising out of the settlement of the estate of bankrupts, and therefore no appeal lies.

"The proceedings in the District Court in the bankruptcy of the Southern Steel Company, which are attacked in the several appeals, to-wit, the sale and disposition of the bankrupt's effects, are regular steps or proceedings in bankruptcy, and no appeal lies from orders and decrees in such proceedings. See Remington on Bankruptcy, 1678, Sec. 2864, for a full discussion, and **First National Bank v. Chicago Title and Trust Co., 198 U. S. 280, 25 Sup. Ct. 693, 49 L. Ed. 1051; In re Whitener, 105 Fed. 185, 44 C. C. A. 434; In re Friend, 134 Fed. 778, 67 C. C. A. 500; Dickas v. Barnes et al., 140**

Fed. 849, 72 C. C. A. 261, 5 L. R. A. (N. S.) 654; Davidson & Co. v. Friedman, 140 Fed. 853, 72 C. C. A. 553.''

SIXTH CIRCUIT.

In re Mueller, 135 Fed. 711, 714, 715, Judge Lurton, now Mr. Justice Lurton, upon a petition for review of an order allowing a claim, stated:

> ''There is no reason to suppose that one may elect whether he will bring up an order or judgment which he wishes to have reversed by appeal or by a petition for review. **These remedies are exclusive of each other.** * * *
>
> ''But where the appeal is from a judgment allowing or disallowing a debt, any question of lien or priority of the debt, if allowed, may be considered on the appeal as an incident of the debt (citing cases). **If, however, the debt or claim is not disputed, and the only question sought to be reviewed is one of the rank or priority of the claim by reason of its character or some lien in its favor against property of the bankrupt,** it has been held by the Circuit Court of Appeals for the Seventh Circuit that, so far as the order or decree depended upon a question of law, it could be reviewed upon a petition for review. * * * This ruling we followed. * * *
>
> ''There remains only the revisory jurisdiction under Section 24b, where it is provided that 'the several Circuit Courts of Appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction.' The consensus of opinion and reason seems to be that this revisory jurisdiction does not include any orders or decrees which are appealable, **the provisions for**

> **appeal and for petition of review being exclusive.** * * * The 'proceedings' reviewable are those administrative orders and decrees in the ordinary course of a bankruptcy between the filing of the petition and the final settlement of the estate, which are not made specially appealable under 25a. This would include questions between the bankrupt and his creditors of an administrative character, and exclude such matters as are appealable under 24a."

In the case of **Brady v. Bernard & Kittinger, 170 Fed. 576, 579**, it is stated that "controversies arising in bankruptcy proceedings" are

> "those independent or plenary suits which concern the bankrupt's estate, and arise by intervention or otherwise **between the trustee representing the bankrupt's estate and claimants asserting some right or interest adverse to the bankrupt or his general creditors.**"

SEVENTH CIRCUIT.

In the case of **In re Friend, 134 Fed. 778**, the Court stated:

> "It may, perhaps, be fairly said that the implication is this: 'A judgment allowing or rejecting a debt or claim of $500 or over' is reviewable, in equity, only under Section 25a; **but an order establishing the priorities of allowed claims,** irrespective of the amounts of the several claims, or a judgment allowing or rejecting a debt or claim of less than $500 is a 'proceeding in bankruptcy' reviewable in equity in matter of law, under Section 24b, because not excluded therefrom by Section 25a."

NINTH CIRCUIT.

In the case of **Morehouse v. Pacific Hardware & Steel Co., 177 Fed. 337, 339, 340,** the Court holds that "proceedings in bankruptcy"

> "include all questions arising in the administration of the bankrupt's estate, such as * * * orders giving priority to the claim of a creditor," etc.
>
> " 'These are questions which, with a view to the prompt administration and distribution of the assets of the bankrupt, the law permits to be summarily disposed of by revision.' Controversies arising 'in the course of bankruptcy proceedings,' says the Court, 'include all controversies and questions arising between the trustee and adverse claimants of property as property of the estate.' "

In view of the objection of the Century Savings Bank to the jurisdiction of the District Court (Transcript, p. 10), and presented again in three assignments of error in the Court of Appeals (Transcript, p. 23), the proceeding in that court must be regarded as a "proceeding in bankruptcy," for otherwise that court was without jurisdiction. If, as is held by the Circuit Court of Appeals for the Eighth Circuit, the proceeding was a "controversy arising in a bankruptcy proceeding," and that, therefore, it was an independent suit, the District Court was limited in its inquiry to the question "whether it could or could not proceed further." If it had jurisdiction it was only because the proceeding was a "proceeding in bankruptcy." All of the steps in a bankruptcy case are proceedings in bankruptcy, except those which involve the rights of persons claiming

adversely to the bankrupt or his trustee and the general creditors.

As is said in **First National Bank v. Title & Trust Co., 198 U. S., l. c. 291:**

> "The sale in the circumstances did not change the situation. The proceeds stood in place of the property."

There was no assertion by the Century Savings Bank of an independent and superior title as against the trustees in the present case, nor did the trustees assert any claim to the fund realized from the sale of the property. **The sole question was as to the distribution of a fund between two holders of liens, the validity of whose liens was unquestioned by the trustees.**

Subdivision 7 of Section 2 of the Bankruptcy Act authorizes the Courts of Bankruptcy to "cause the estates of bankrupts to be collected, reduced to money **and distributed,** and **determine controversies in relation thereto,**" except in the cases enumerated in section 23, which apply to "controversies at law and in equity, as distinguished from proceedings in bankruptcy, **between trustees as such and adverse claimants.**"

Section 23 so clearly defines what are "controversies arising in bankruptcy proceedings," that it would seem absolutely to exclude every proceeding that is not between the trustee and an adverse claimant; so that any controversies concerning the distribution of the estate arising between the creditors among themselves would seem to be "proceedings in bankruptcy."

Bardes v. Hawarden Bank, 178 U. S. 524, 537, 538;
Snow v. Dalton, 203 Fed. 843, 845;
Hutchinson v. Otis, 190 U. S. 552, 555.

This honorable Court, in the case of Holden v. Stratton, 191 U. S. 115, 118, stated:

> "The jurisdiction now given is carefully restricted and cannot be expanded beyond the letter of the grant. * * * The distinction between steps in bankruptcy proceedings proper and controversies arising out of the settlement of the estates of bankrupts is recognized in sections 23, 24 and 25 of the present act and the provisions as to revision in matter of law and appeals were framed and must be construed in view of that distinction."

Respectfully submitted,

S. F. PROUTY,
NEWTON P. WILLIS,
GEO. F. HAID,
Counsel for Petitioners.

Due and legal service hereof accepted and acknowledged, this .... day of February, 1914.

Solicitors for Petitioner.

RESISTANCE TO THE PETITION OF MOODY & SON FOR THE WRIT OF CERTIORARI.

Respondent, Century Savings Bank, an Iowa corporation, respectfully resists the application of Petitioners, Robert Moody & Son, for the issuance of the Writ of Certiorari, in above cause, on the following grounds:—

FIRST: This cause is appealable to this Court from the United States Circuit Court of Appeals for the Eighth (8th) Circuit. Petitioners above named, as appellants, have already taken such appeal and have served upon respondent above named, as appellee, a citation to appear in this Court and defend such appeal. A true copy of said citation, and of the acknowledgment of service thereof, made on the 29th day of January, 1914, is as follows, to wit:

THE UNITED STATES OF AMERICA.

TO CENTURY SAVINGS BANK, GREETING:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington, D. C., thirty days from and after the day this citation bears date, pursuant to an appeal filed in the Clerk's office of the United States Circuit Court of Appeals for the Eighth Circuit, wherein Robert Moody & Son, a co-partnership composed of Robert Moody and Thomas F. Moody are appellants, and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellants, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

WITNESS, the Honorable Walter H. Sanborn, Presiding Judge of the United States Circuit Court of Appeals for the Eighth Circuit, this 27th day of January in the year of our Lord one thousand nine hundred and fourteen.

(Signed) WALTER H. SANBORN,
Presiding Judge of the United States Circuit Court of Appeals For the Eighth Circuit.

We hereby admit service of the within citation this 29th day of January, 1914.

HORATIO F. DALE,
WM. G. HARVISON,
(DALE & HARVISON),
Counsel for Century Savings Bank.

An affidavit, showing service of the above citation, is filed with the Clerk of this Court, and prayed to be taken as a part of this resistance.

SECOND: The conflicting decisions of U. S. Circuit Courts of Appeals, and other inferior U. S. Courts, on the question of the right to appeal a cause like this, have been settled by later decisions of this Court, hereinafter cited in respondent's Brief, in support of this resistance.

THIRD: There is no question of general public interest involved in this cause, such as to justify the issuance herein of the Writ of Certiorari.

Respectfully submitted,
HORATIO F. DALE AND WM. G. HARVISON,
(of the firm of Dale & Harvison),
Solicitors for Respondent.

RESPONDENT'S BRIEF.

IN SUPPORT OF THE FOREGOING RESISTANCE.

OPINIONS OF THE EIGHTH U. S. CIRCUIT COURT OF APPEALS.

The opinions of the U. S. Circuit Court of Appeals for the Eighth (8th) Circuit, in disposing of this cause, are contained in the Federal Reporter, as follows:—

Century Sav. Bk. v. Moody & Son, 204 Fed., 963;
Century Sav. Bk. v. Moody & Son, Fed.

Note: The opinion last above mentioned has not been printed in the Federal Reporter at the date of Preparation of this Resistance. A true and complete copy thereof, however, is found at the close of this brief.

THE FACTS.

Mrs. Emma Johnson had a *first* mortgage, signed by both husband and wife, on 960 acres of land, in the State of Iowa, the property of the bankrupt, Oscar M. Hartzell, of which 40 acres was a homestead, under the statutes of Iowa, and the remaining 920 acres was non-homestead land. This mortgage was held by R. A. Crawford, as administrator of the deceased mortgagee.

Petitioners, Moody & Son, had a *second* mortgage on the same 960 acres belonging to the bankrupt; but this mortgage was of no validity as to the *homestead*, because petitioner's mortgage was not signed by both husband and wife.

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The *Code of Iowa* of 1897 provides:

> *Section 2974.* "No conveyance or incumbrance of, or contract to convey or incumber the HOMESTEAD, if the owner is married, is valid, *unless the husband and wife join in the execution of the same joint instrument,* whether the homestead is exclusively the subject of the contract or not; but such contracts may be enforced as to real estate other than the homestead at the option of the purchaser or incumbrancer."

Respondent, Century Savings Bank, had a mortgage, *third* in point of time, upon the same 960 acres of the land of the bankrupt, which was duly signed and acknowledged by both the bankrupt and his wife. As matter of law, this mortgage was *second* as to the homestead 40 acres, junior only to the Johnson first mortgage, and *third* as to the non-homestead 920 acres, being junior to both the Johnson and the Moody & Son mortgages, as to the non-homestead lands.

One of the important legal questions involved, affecting the merits of this cause, arises under the latter part of Section 2976 of the Code of Iowa of 1897, which reads as follows:

> *Section 2976.* "It (the homestead) may also be sold for debts created by written contract executed by the persons having the power to convey, and expressly stipulating it is liable therefor, *but then only for a deficiency remaining after exhausting all other property pledged by the same contract for the payment of the debt.*

By agreement of all concerned, this tract of 960 acres of land was sold by the Trustee, as an entirety, discharged of the liens of all mortgages and other liens, *the proceeds to take the place of the mortgaged premises.* The total sum realized from the sale of the whole tract was $64,253.00. The trial Court, Hon. Smith McPherson, District Judge, established the value of the homestead 40 acres at $8,000.00, which valuation has not been questioned by any party. This left the balance, to wit: $56,253.00, as the proceeds of the sale of the non-homestead 920 acres.

The Century Savings Bank claimed that all of this $8,000.00, proceeds of the homestead, belonged to it, leaving a large balance still due the bank and unpaid: that the Johnson first mortgage, amounting to $40,580.83, should be paid entirely from the $56,253.00, the proceeds of the non-homestead lands, and the balance of the proceeds of the non-homestead lands, in the sum of

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$5,683.94, and no more, after deducting all other disbursements, ordered or approved by the Court, should be paid to petitioners, Moody & Son. The sum adjudged by the trial Court to Moody & Son was $10,736.67.

The trial Court expressly found that, after paying the Johnson first mortgage, and all other disbursements ordered or approved by the Court, there was left the sum of $13,683.94 to be applied on the Moody & Son and the Century Savings Bank mortgages. This finding of fact is not questioned.

Moody & Son claimed a marshalling of assets, whereby the proceeds of the homestead should be apportioned between the Johnson first mortgage on the homestead, and the Century Savings Bank second mortgage on the homestead. The right to such marshalling of assets was denied by said bank.

It is conceded by all parties that Crawford, Admr., holding the Johnson first mortgage, as first mortgagee, was justly entitled to the sum actually adjudged and paid to him, but the bank, respondent and appellee, contended that no part of this sum should be taken from the proceeds of the homestead 40 acres, and insisted that all of said sum should be taken and paid to the first mortgagee, from the proceeds of the non-homestead lands, said proceeds being much more than sufficient for that purpose.

THE DECISIONS OF THE LOWER COURTS.

The trial Court held there should be an apportionment of the Homestead proceeds, and adjudged $5,052.63 thereof to be applied on the Johnson first mortgage, and $2,947.27 thereof to be applied on the Bank's second mortgage, and that the balance of the proceeds of the non-homestead lands, in the sum of $10,736.67 be paid to Moody & Son, petitioners.

There is an error of ten cents in the figures apportioning the proceeds of the homestead which aggregated $7,999.90, instead of $8,000.00, but this is of no consequence.

The Bank's contention was and is, that the net proceeds of the homestead and non-homestead lands should have been applied as follows:

Non-homestead proceeds, on the Johnson mortgage,	$40,580.83
Homestead proceeds, on the Bank mortgage,	8,000.00
Non-homestead proceeds, on the Moody mortgage,	5,683.94
Other disbursements,	9,988.23
Total proceeds of land,	$64,253.00

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The Bank claimed the whole $8,000.00, and received only $2,947.27. Moody & Son were awarded $10,736.67, when, as claimed by the Bank, they should have received only $5,683.94. This difference arose through the apportionment of the proceeds of the homestead, and the awarding therefrom to the first mortgagee the sum of $5,052,63, thereby diminishing the Bank's award by that sum, and increasing the award of Moody & Son by the same sum. This is the amount in controversy in this cause, between Moody & Son and the Bank.

The U. S. Circuit Court of Appeals, Eighth Circuit, reversed the decree of the trial Court, and awarded to the Bank all of the proceeds of the homestead in the sum of $8,000.00 and applied the proceeds of the non-homestead lands first in payment, in full, of the Johnson first mortgage, and the balance upon the mortgage of Moody & Son, reducing the sum to be paid to said firm to the sum of $5,683.94.

The two opinions of the Court of Appeals rested chiefly on the question of marshalling of assets, but in the second opinion, hereinafter set out, HON. WALTER I. SMITH, Circuit Judge, rests his concurrence mainly upon the fact of the 40 acres being a statutory homestead, in the State of Iowa, and the application of the proceeds of the homestead and non-homestead lands being governed by the Iowa statutes above referred to.

RESPONDENT'S PROPOSITIONS.

FIRST PROPOSITION: The Trustee in bankruptcy has nothing to do with the homestead, or the proceeds thereof. Under the statutes of the State of Iowa, the homestead belongs absolutely to the bankrupt, or his assigns, or those holding valid liens thereon. The proceeds of such homestead cannot be used for the payment of claims of general creditors, having no valid contract lien on the homestead. When the proceeds of the homestead come into the hands of the Trustee in bankruptcy, he holds them in trust for the person or persons entitled thereto, but not as trustee for the general creditors.

SECOND PROPOSITION: The claim of the Century Savings Bank to a first lien on the bankrupt's homestead, and to all of the proceeds of the bankrupt's homestead, as presented by the pleadings filed in the U. S. District Court, constituted *'a controversy arising in bankruptcy proceedings,'* or *'a controversy arising in the settlement of the estate of the bankrupt,'* the amount involved exceeding $5,000.00, and was appealable from the U. S. District Court to the U. S. Circuit Court of Appeals, (8th Circuit), and to this Court from said Circuit Court of Appeals, (1)

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under Bankruptcy Act, (1898), Section 24-a; or (2) under said Bankruptcy Act, Section 25-a (3); or (3) under the Circuit Court of Appeals Act of March 3, 1891.

THIRD PROPOSITION: There is no question, in this case, affecting any general public interest.

ARGUMENT OF FIRST PROPOSITION.

The Trustee in bankruptcy, as trustee for the general creditors, has nothing to do with the proceeds of an Iowa homestead, and holds such proceeds in trust only for the persons entitled thereto.

Lockwood v. Exchange Bank, 190 U. S. 294, 47 Law ed. 1061;
In re Bailey, 176 Fed. (D. C.—Utah) 990;
Bankruptcy Act, (1898), Section 6.

The homestead tract of 40 acres of land in Iowa, was exempt to the bankrupt, or those lawfully claiming under him.

Code of Iowa of 1897, Sections 2972, 2976, 2978 and 2981;
Alley v. Bay, 9 Iowa, 509;
Taylor v. Trulock, 59 Iowa, 558;
Waugh v. Bridgeford, 69 Iowa, 336;
Bolton v. Oberne & Co., 79 Iowa, 278;
Estate of Gill, 79 Iowa, 296;
Redfield v. Stocker, 91 Iowa, 383;
Boggs v. Douglas, 105 Iowa, 344;
Central Tr. Co. v. Stepanek, 138 Iowa, 131.

The trial Court expressly found that a specified 40 acres was exempt to the bankrupt as a homestead, (Finding No. 4), and that the proceeds of the homestead, ($8,000.00), was received by the trustee by reason of the sale of the homestead, with the other (920 acres) lands. (Finding 11-2.)

Under these circumstances, the trustee had no interest whatever in the controversy, and was neither an indispensable, necessary, nor proper party to such appeal.

ARGUMENT OF SECOND PROPOSITION.

This case was appealable from the District Court to the Court of Appeals and from that Court to this Court.

This is 'a controversy in a bankruptcy proceeding,' or 'a controversy arising in settlement of the estate of the bankrupt'. The Circuit Court of Appeals so decided. (Fed. .)

It was appealable from the U. S. District Court to the U. S. Circuit Court of Appeals, Eighth Circuit, and from that Court to this Court, under the Bankruptcy Act (1898), Section 24-a, or Section 25-a (3), or under the Circuit Court of Appeals Act, of March 3, 1891.

Appealable under Section 24-a of the Bankruptcy Act, (1898).

Greey v. Dockendorff, 231 U. S. 513, 58 Law Ed. (MR. JUSTICE HOLMES);

National City Bank (N. Y.) v. Hotchkiss, 231 U. S. 50, 58 Law ed. ....., (MR. JUSTICE HOLMES);

Mechanics' & M. Nat. Bk. (N. Y.) v. Ernst, 231 U. S. 60, 58 Law ed. ....., (MR. JUSTICE HOLMES);

Houghton v. Burden, 228 U. S. 161, 57 Law ed. 780. (MR. JUSTICE LURTON);

Re Loving, 224 U. S. 183, 56 Law ed. 725. (MR. JUSTICE DAY);

Teft v. Munsuri, 222 U. S. 114, 56 Law ed. 118. (MR. CHIEF JUSTICE WHITE);

Knapp v. Milwaukee Tr. Co., 216 U. S. 545, 54 Law ed. 610. (MR. JUSTICE DAY);

Coder v. Arts, 213 U. S. 223, 53 Law ed. 772. (MR. JUSTICE DAY);

First Nat. Bk. v. Chicago Title & Tr. Co., 198 U. S. 280, 49 Law ed. 1051. (MR. CHIEF JUSTICE FULLER);

Hewit v. Berlin Mch. Works, 194 U. S. 296, 48 Law ed. 986. (MR. CHIEF JUSTICE FULLER).

Appealable under Section 25-a (3) of the Bankruptcy Act of 1898.

Re Loving, 224 U. S. 183, 56 Law ed. 725. (MR. JUSTICE DAY);

Teft v. Munsuri, 222 U. S. 114, 56 Law ed. 118. (MR. CHIEF JUSTICE WHITE);

Coder v. Arts, 213 U. S. 223, 53 Law ed. 772. (MR. JUSTICE DAY).

Appealable under the Circuit Court of Appeals Act of March 3, 1891.

Re Loving, 224 U. S. 183, 56 Law ed. 725. (MR. JUSTICE DAY);

Knapp v. Milwaukee Trust Co., 216 U. S. 545, 54 Law ed. 610. (MR. JUSTICE DAY);

Coder v. Arts, 213 U. S. 223, 53 Law ed. 772. (MR. JUSTICE DAY);

First Nat. Bk. v. Chicago Title & Tr. Co., 198 U. S. 280, 49 Law ed. 1051. (MR. CHIEF JUSTICE FULLER).

ARGUMENT OF THIRD PROPOSITION.

There is no question of general public interest involved herein, justifying the granting of the Writ of Certiorari.

The legal question has been settled, that the trustee has nothing to do with the homestead or the proceeds thereof, as trustee for the general creditors.

The legal question has also been settled, that this case is appealable to this Court from the U. S. Circuit Court of Appeals, Eighth Circuit.

With these legal propositions settled, there is no question of general public interest in the case, which will justify the granting of the Writ of Certiorari herein.

The second opinion of the Eighth Circuit Court of Appeals in this cause, as yet unpublished, hereinbefore mentioned under the sub-head or catchword *"Note"*, is as follows:

UNITED STATES CIRCUIT COURT OF APPEALS.
EIGHTH CIRCUIT.

No. 3793.—DECEMBER TERM, A. D. 1913.

Century Savings Bank, Appellant, vs. Robt. Moody & Son, et al., Appellees.	Appeal from the District Court of the United States for the Southern District of Iowa.

Mr. Horatio F. Dale and Mr. W. G. Harvison for appellant.
Mr. S. F. Prouty, Mr. N. P. Willis and Mr. Geo. F. Haid for Robt. Moody & Son, appellees.

Before HOOK and SMITH, Circuit Judges, and VAN VALKENBURGH, District Judge.

HOOK, Circuit Judge, delivered the opinion of the Court.

This is a motion to dismiss the appeal of the Century Savings Bank from a decree of a district court as a court of bankruptcy upon the ground that the exclusive remedy was by petition to revise

The appeal had been argued, submitted and decided without suggestion by anyone that appellant should have come here by a different route. After our opinion had been handed down (*Century Savings Bank v. Robt. Moody & Son*, ... C. C. A. ...., 204 Fed. 963) and a decree had been entered in favor of appellant reversing the decree of the district court, the appellees requested us to set the decree aside and make findings of fact and conclusions of law according to General Order in Bankruptcy No. XXXVI, p. 3, to enable them to take the case to the Supreme Court. The General Order provides that the findings and conclusions be made at or before the entering of the decree. It is our practice not to anticipate a further appeal but to await request for findings and conclusions; and if the decree has then been entered, to vacate it so that the Order may be observed. Therefore, when appellees made their request the decree was vacated, but that being done they for the first time challenged the particular method by which this court had acquired cognizance and made the motion to dismiss.

Passing the matter of practice disclosed by the foregoing the question presented depends upon the character of the proceeding below from which the appeal was taken. By sec. 2, p. 7 of the bankruptcy act courts of bankruptcy have jurisdiction to "cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto". Sec. 24a gives circuit courts of appeals jurisdiction by appeal of "controversies arising in bankruptcy proceedings". By 24b they have jurisdiction in equity to superintend and revise in matter of law proceedings in bankruptcy. Sec. 25a, which also relates to proceedings in bankruptcy or bankruptcy proceedings proper as distinguished from controversies, provides for appeals to the circuit court of appeals in three classes of cases, the third being "a judgment allowing or rejecting a debt or claim of five hundred dollars or over", but this case is not of that character.

The following conclusions may be drawn from the decisions of the Supreme Court: The presentation for allowance of a demand against a bankrupt's estate is a step in bankruptcy proceedings as to which appeal is specially provided by sec. 25. If both a demand and a lien to secure it be presented at the same time the procedure for the former dominates, the lien goes along as an incident, and the double presentation is also regarded as a step in the bankruptcy proceeding. To this effect are *Coder v. Arts*, 213 U. S. 223, and *In re Loving*, 224 U. S. 183. Of *Hutchinson v. Otis*, 190 U. S. 552, sometimes carelessly cited, the court said in *Coder v. Arts:* "The contest in the *Otis* case, as in this, was over the claim presented, and, incidentally, to establish a lien upon the bankrupt's estate". In none of the cases, however, has it been held that there cannot be

an independent assertion of the lien alone so as to create a controversy appealable under sec. 24a. *Knapp v. Milwaukee Trust Co.*, 216 U. S. 545, and *Houghton v. Burden*, 228 U. S. 161, are examples of controversies over liens. In the former, the trustee first petitioned for the sale of the bankrupt's property. A mortgagee then intervened "and asked to have the lien of the mortgage established as the first lien on the property and satisfied out of the proceeds of the sale. The property was sold and the question is as to the lien of these mortgages upon the fund". It was held this made an appealable controversy, not a bankruptcy proceeding. *Houghton v. Burden*, as explained by the report in the Court of Appeals, *In re Canfield*, 113 C. C. A. 562, 193 Fed. 934, also involved an independent assertion of a security or lien giving rise to a controversy appealable under sec. 24a. *Coder v. Arts* and *In re Loving* on the one hand and *Knapp v. Milwaukee Trust Co.* and *Houghton v. Burden* on the other are in entire harmony. Other instances of appeals in controversies over liens are *Hurley v. Railway*, 213 U. S. 126, 82 C. C. A. 453, 153 Fed. 503, and *Merchants Nat. Bank v. Sexton*, 228 U. S. 634, *sub nom. In re Kessler*, 108 C. C. A. 239, 186 Fed. 127, without discussion, however, of the particular appellate remedy. The latter case went to the Court of Appeals by both appeal and petition to revise and it does not appear which was entertained, but as sec. 25 did not apply and as there was a further appeal to the Supreme Court jurisdiction depended upon 24a, not 24b. Had it been a petition to revise under 24b, see *Holden v. Stratton*, 191 U. S. 115. Whether there is a controversy for appeal or a mere bankruptcy proceeding for petition to revise does not necessarily depend upon who first brought it about. For example, in the *Knapp* case which was held to be a controversy, the trustee petitioned that the property be sold and then the mortgagee appeared for the assertion of his lien.

Is this case a controversy arising in a bankruptcy proceeding within 24a or is it a bankruptcy proceeding under 24b? If the former, appeal is the remedy; if the latter, petition to revise. In our former opinion only those facts were recited which were necessary to present the question decided. It is now necessary to go further to determine the character of the proceeding in the district court. One Hartzell had been adjudged bankrupt. In his estate were 960 acres of land heavily encumbered with mortgage, judgment, attachment and tax liens. His homestead was included in this land and was claimed as such in his schedule, but the exemption was afterwards waived by him and his wife. The trustees in bankruptcy filed a petition that the land be sold free of all encumbrances, that the liens be marshalled and transferred to the proceeds, that a

prior sale under a foreclosure of a mechanic's lien and also an attachment be declared null and void, and "that these trustees have all other relief as may be necessary and proper in the premises". The appellant, the Century Savings Bank, had a valid mortgage upon all of the land including the homestead. Moody & Son, the appellees, had a mortgage upon all of the land including the homestead, but as to the latter the wife of the bankrupt had not joined. The appellant Bank filed what it termed an answer in which it asked relief against not only the trustees but also the appellees. It set out in this pleading the various encumbrances and liens in detail, admitted some as superior to its mortgage, claimed that others were inferior, denied that the appellees had any mortgage or interest in any of the real estate, and alleged that their pretended mortgage on the homestead was null and void under the state statute because the bankrupt's wife had not joined. The appellant also denied the right of the trustees to the homestead and the jurisdiction of the court over it except to determine the boundaries and set it off to the bankrupt with leave to the creditors to prosecute their liens against it in the state courts; but said it did not object to the sale of the property provided its mortgage rights were protected and extended to the proceeds. It averred that it had filed its claim as a creditor of the bankrupt. The prayer was that if the property was sold free from the liens the proceeds be distributed in the order definitely specified by the appellant, those of the homestead to be kept separate, and that if there then remained a balance due appellant it should in respect thereof be allowed to participate with other creditors in the general assets and "for all such other and further relief as to equity may pertain". The pleading of the appellant, though styled an answer, was in substance an intervening petition claiming affirmative relief in respect of its lien against both the trustees and the appellees. The claim against the trustees, if it had any merit, which is doubtful, became immaterial as will presently be seen, and the real controversy was between appellant and appellees over the validity of appellees' mortgage and the priority of their respective liens. It is important to note that appellant was not asserting its mortgage lien as an incident to the presentation for allowance of its claim against the general estate as was the case in *Coder v. Arts* and *In re Loving*. So far as could be in the nature of things there was a separate, independent assertion of its mortgage. The District Court ordered the sale of the lands and that the liens be transferred to the proceeds. The sale was made for a sum insufficient to pay the mortgages, all of which were prior to and unaffected by the bankruptcy proceedings. In other words, it became manifest nothing would be left for the general estate and it could be of no interest to the trustees or the general estate

whether a deficiency of claim after the application of the proceeds of the mortgaged realty should be that of appellant or that of the appellees; so there was then disclosed a controversy in which the trustees had no real interest but which was between individual lien holders. The District Court then proceeded to try the issues between the appellant and the appellees. The appellant filed exceptions to the proposed findings of fact, conclusions of law and decree of the District Court; the exceptions were overruled and a decree was entered in favor of the appellees upon the matter in difference between them and the appellant. The nature of this decree appears from our former opinion.

The case has the substantial aspects of an independent controversy. There is a distinct alignment of parties, and pleadings unconnected with the ordinary assertion for allowance of a demand against the estate. The marshalling of liens is a substantive head of equitable jurisdiction. Appellant's pleading was in substance and form an intervention in equity. The trial court proceeded as in a plenary, independent controversy and called its conclusion a decree. To be sure, the property belonged to the bankrupt and was in the control of the trustees, but sec. 2, p. 7 and sec. 24a contemplate controversies over property so owned and situated. A controversy under 24a may be as to title, *Hewit v. Berlin Machine Works*, 194 U. S. 296, or as to lien, *Knapp v. Milwaukee Trust Co., supra*, but if the latter it should arise independently of the ordinary presentation for allowance of the claim it secures, *Coder v. Arts, supra*. This was a controversy under 24a and appeal, not petition to revise, was the proper remedy. The motion to dismiss is denied. The request for findings of fact and conclusions of law is also denied. General Order XXXVI does not apply. *Knapp v. Milwaukee Trust Co., supra*. The order setting aside the decree is vacated.

Filed December 11, 1913.

SMITH, Circuit Judge, concurring.

I concur in the foregoing opinion but in doing so attach weight to the fact that this was a controversy as to the proceeds of the homestead and so far as the matters here are concerned involved nothing else. The homestead was exempt under the laws of Iowa, Section 2972, Code of 1897. Under the circumstances the title to it did not pass to the trustee. *Lockwood v. Exchange Bank*, 190 U. S. 294; *Ingram v. Wilson*, 125 Fed. 913; *In re Nye*, 133

Fed. 33; *In re O'Rear*, 189 Fed. 88; *Gregory v. Bristol*, 191 Fed. 31; *Huntington v. Baskerville*, 192 Fed. 813.

The only jurisdiction the Court had in the bankruptcy proceeding proper was to set apart the exemptions. True the homestead was mortgaged with other property which was subject to the bankruptcy proceeding but the entire property was mortgaged for more than it was worth. The general creditors had no claims against the homestead and the District Court as a court of bankruptcy had no jurisdiction to take the homestead into its possession because the general creditors had and could have no claims against it. The court of bankruptcy as such therefore had nothing whatever to do with the homestead except to assign or set it off. If the homestead or its proceeds ever further came within the Jurisdiction of the District Court it was not in the bankruptcy case proper but in a controversy which arose therein.

The opinion of Judge Hook is exhaustive and is, I think, correct but I prefer to put my concurrence chiefly upon the grounds just stated.

Filed December 11, 1913.

A true copy.

Attest: JOHN D. JORDAN,

Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

Respectfully submitted,

HORATIO F. DALE and
WM. G. HARVISON.
(DALE & HARVISON),
Solicitors for Respondent.

/3

Office Supreme Court, U.
FILED
MAR 3 1915
JAMES D. MAHER

IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

No. 70

ROBERT MOODY & SON, A CO-PARTNERSHIP COMPOSED OF ROBERT MOODY AND THOMAS F. MOODY, *Appellants,*

vs.

CENTURY SAVINGS BANK, A CORPORATION, *Appellee.*

BRIEF AND ARGUMENT OF APPELLANTS.

S. F. PROUTY, Des Moines, Iowa,
GEORGE F. HAID, St. Louis, Mo.,
NEWTON P. WILLIS, Canadian, Texas,
Attorneys for Appellants.
HORATIO F. DALE, Des Moines, Iowa,
W. G. HARVISON, Des Moines, Iowa,
(Constituting the firm of
Dale & Harvison),
Attorneys for Appellee.

Due legal and timely service hereof is hereby accepted, admitted and acknowledged at Des Moines, Iowa, this ..... day of February, 1915.

.....
Attorneys for Appellee.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

No. ——.

ROBERT MOODY & SON, A CO-PARTNERSHIP COMPOSED OF ROBERT MOODY AND THOMAS F. MOODY, *Appellants*,

vs.

CENTURY SAVINGS BANK, A CORPORATION, *Appellee*.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

STATEMENT AND BRIEF FOR APPELLANTS.

Two questions are involved in this case.

First. Has a United States Court of Appeals jurisdiction upon an appeal to review an order in bankruptcy determining to what extent two lien creditors, as between each other, shall participate in a fund in which neither the trustees nor the other creditors claim any right?

Second. Whether under a Statute of Iowa (Section

2976 of the Code of 1897) providing that a homestead may be sold for debts created by written contract but only for a deficiency remaining after exhausting all other property pledged by the same contract, a court of equity may, after a written waiver of the homestead right by the owners, marshal the assets and direct payment of a first mortgage proportionately out of the non-homestead and homestead property to protect a second mortgage whose security is non-homestead property only, notwithstanding a third mortgage which covers both the homestead and non-homestead property?

The Facts.

The controversy arose out of proceedings initiated by the Trustees in Bankruptcy of Oscar M. Hartzell in the District Court of the United States for the Southern District of Iowa, by filing in the bankruptcy proceedings a petition stating, in substance, that the title to the lands described was vested in them by operation of law; that such real estate had been appraised as required by law; that certain persons, including the parties before this Court, had certain described liens against said property, the validity of which was not attacked, and praying for an order directing the sale of said property free from all liens and claims, that the liens of the creditors be marshalled, and that the proceeds of the sale of said real estate be held by the Trustees subject to the adjudication of this Court for the payment of said liens in the order in which they are established.

The Century Savings Bank, the holder of a third mortgage, filed an answer setting out the facts with reference to the execution of the various liens. The answer then states (Transcript, p. 10):

"Par. 12. For further answer, this defendant admits that petitioners are the trustees in bankruptcy of said (bankrupt's) estate, but avers that their interest, as such, in said real estate, is subject to the said mortgage lien of this defendant thereon. And this defendant further respectfully represents that this Honorable Court is without power or jurisdiction to make any order authorizing the trustees to sell said homestead, and is without power to make any orders affecting same other than to determine the boundaries thereof, and setting same apart to the bankrupt, with leave to creditors to prosecute their liens against the same in the State courts.

"Par. 13. And this defendant further avers that, as against this defendant, the trustees have no interest in that part of said real estate which constitutes the homestead of the bankrupt, the adjudication of bankruptcy having the effect of transferring to them the title to the non-exempt property of the bankrupt only, and not including his homestead. This defendant does not now, however, and never has, objected to the sale of said real estate free and clear of liens; provided that the order for such sale shall reserve and protect to this defendant its interest in said real estate, as herein stated; that prior to such order, or as a part thereof, the same should provide for the appraisal of said real estate, the homestead to be appraised separate, distinct from the remainder thereof, or that the appraisal already so made, if any, should be taken in lieu thereof; and any sale of said premises should be without prejudice to the rights of this defendant to assert its mortgage lien upon and interest in the proceeds arising from said sale, to the same extent, and with the same force and effect that its mortgage lien, and its other interest herein stated now rests upon said premises, and the proceeds of said sale should be impressed with the mortgage lien and the mechanic's lien of the defendant in the premises, to the same extent that its said interest now exists in said premises; and in the event that it shall be found advisable to sell said homestead in con-

nection with all or any part of the remainder of said real estate, that then, and in that case the mortgage lien of this defendant thereon shall attach to and be impressed upon the proceeds thereof, with the same force and effect as the same now exists and against said homestead."

A sale was directed by the Court, the order providing, among other things (Transcript, p. 12), that the same be sold free and clear of all liens or claims "of all persons whomsoever in and to said premises or any portion thereof, and the respective liens or claims of all persons whomsoever in, to, or upon said premises, are hereby removed from said premises and all portions thereof, and are hereby transferred to the funds derived from the sale of said premises by said trustees, and that the funds arising from said sale be held by the said trustees subject to the payment of whatever liens or claims may be established against said funds or any part thereof, and the costs of these proceedings, and to be distributed in accordance with the order of the Court."

The District Court filed findings of fact and conclusions of law, as follows (Transcript, p. 15):

"*Findings of Fact and Conclusions of Law.*

"This case as to the matters and things in these findings and conclusions recited was fully argued by counsel and submitted to the Court, and by the Court taken under advisement, on the — day of November, 1911. Now at this time, the Court being fully advised, makes the following findings of fact:

"1. The bankrupt, Oscar M. Hartzell, in the year 1908, and for some years prior thereto, had been and was a resident and citizen of Madison County, Iowa, which county is within this division and district. And while thus a resident and citizen, he was, on his own petition, erroneously stated by the Master as filed on August 8, 1908, adjudicated a bankrupt by this Court on August 1, 1908.

"2. August 1, 1908, and for some time prior thereto and at all times since, the said Hartzell was and still is a married man, he and his wife living together as husband and wife.

"3. At the time of his adjudication as a bankrupt, the said Hartzell was the owner of considerable land and personal property, a part of which land is described as follows, viz:

"All of section fourteen (14), being 640 acres, and the east half of section fifteen (15), being 320 acres, to be known and designated in these findings as the Meade land. And 120 acres in section ten (10), to be known in these findings as the Laughlin land; all of which land was in township seventy-seven (77), range twenty-six (26), Madison County, Iowa. All of said land was heavily mortgaged, covered by valid (mortgages) in no way voidable under the bankrupt law.

"4. At the time of his adjudication the homestead of said Hartzell, where he and his wife and family resided for quite a period of time, and where they resided for a time after the adjudication, was the forty acres of land, one-half of which was the southwest twenty acres of said section fourteen, and the other twenty acres was the southeast twenty acres of said section fifteen, being a tract of forty acres square, on which forty acres were the residence, barns and other things necessary to make a home.

"5. The first mortgage lien resting on and against said section fourteen and the east half of section fifteen, including said homestead, was, when paid off by order of this Court in this proceeding, approximately for the sum of $40,000.00. That mortgage was signed, joined and concurred in by both Hartzell and his wife, as mortgagors of the same joint instrument. And the mortgage was at once placed of record in the county recorder's office, which mortgage was to a Mrs. Emma Johnson as mortgagee. She has since died, and her estate is represented by Mr. Crawford as administrator. Said mortgage was executed and recorded, as were all

mortgages herein mentioned, before the bankruptcy proceedings.

"6. The said Hartzell and wife executed a mortgage to the Valley Savings Bank for $4,000.00 on the 120 acres herein referred to as the Laughlin land, which mortgage was duly executed on the 1st day of March, 1907, and at once recorded.

"7. The next mortgage in point of time, executed by Oscar M. Hartzell alone, was in favor of Robert Moody & Son, as part collateral for approximately the sum of $86,000.00, of which there still remains unpaid approximately the sum of $17,000.00. That mortgage, on its face, purported to convey all of the lands in section fourteen and all of the east half of section fifteen and the 120 acres in section ten, making in the aggregate 1,080 acres, which purported to include the forty-acre homestead a part of said tract, as aforesaid recited. Daisy F. Hartzell, wife of Oscar M. Hartzell, did not sign, join nor concur in the said mortgage to Moody & Son. The Moody mortgage was at once filed for record as provided by the Iowa laws.

"8. After the making and recording of the three mortgages aforesaid, and at a later period, June 11, 1908, and duly recorded June 13, 1908, Hartzell gave a mortgage to secure the Century Savings Bank of Des Moines, Iowa, of an indebtedness approximately the sum of $19,513.50. The wife signed, joined in and concurred in the same joint instrument or mortgage. That mortgage was duly recorded.

"9. All of said mortgages were to secure an actual indebtedness and were made and placed of record at once when executed.

"10. After the adjudication in bankruptcy, this Court, with the bankrupt, the trustees of the estate, and all of said mortgagees, and all of the creditors before it, all consenting to and acquiescing in, entered a decree directing the said trustees to sell all of said 1,080 acres of land free from all liens and encumbrances of any and all kinds, by perfect title, and that said liens and all of them, should rest on, and be liens

against the proceeds of said sales, with the same and like effect, neither less nor greater, than said liens had theretofore, and in the same order as against said lands. Pursuant to said decree the said trustees did sell to one Joseph Meade, for $64,253.00, which said sale was approved by this Court on July 5th, 1911, which said purchase price was received by the trustees. And the 120 acres in said section ten were by said trustees sold to T. F. Laughlin for $6,000.00, which said sale was by this Court approved July 15th, 1911. Deeds were made and approved, conveying said lands to Meade and Laughlin respectively.

"The said indebtedness and liens as aforesaid have been fully paid off by the said trustees, except the one to Moody & Son and the one to the Century Savings Bank.

"11. A mechanic's lien, labor claims, and a number of other preferred claims have all been paid off in full. There will be no moneys to pay to general creditors, but the said general creditors must be paid, if at all, out of other assets of the estate. All court costs have been paid, including the commissions and expenses of the referee, trustees, attorneys' fees and all other matters about which there could be any contention and which are not longer material in this case.

"After paying all of the foregoing, the trustees have in their possession from said sales of said lands, the sum of $13,683.94 to be applied on the claims of Robert Moody & Son and the Century Savings Bank, which amount is not sufficient to pay in full both or either of said claims.

"12. While all of the lands thus sold to Meade were sold him as one tract of 960 acres, yet as a fact, the homestead forty acres as thus included, was of the value of $8,000.00 at the time of sale and was included in the grand total of $64,253.00 paid for the entire tract. And all of the parties in open court agree that the said homestead was worth $8,000.00, and which amount was received by the trustee by reason of the sale of the homestead, with the other lands.

"13. October 14, 1908, the said Oscar M. Hartzell, and his wife, Daisy F. Hartzell, signed and delivered an instrument in writing by which they and each of them did surrender to the trustees of this estate the said forty acres or homestead tract aforesaid, *authorizing and empowering the said trustees to treat the said homestead forty acres as part of the pro[illegible]ty of this bankrupt estate, the same as the non-exempt property of the estate.* And that instrument was at once placed of record in the county recorder's office, the office provided by law for recording instruments affecting real estate. And after Meade and Laughlin had made their purchases, but as a part of the same transaction, the said Hartzell and wife conveyed all of their interest in said land to said Meade and Laughlin respectively. And except as to the application of the moneys now on hand, no one now asserts any rights to said homestead forty acres. *Neither Hartzell nor his wife make any claims on account of the homestead.* But each of them agrees that the money received from the sale of the homestead may be treated as other funds of the estate. This leaves it to the Court, however, to make application and distribution of the money, as the foregoing facts may require.

"14. When this Court took jurisdiction of and made orders relative to said lands it was believed that there existed equities of considerable sums for creditors other than lien holders and those having preferred claims. But the trustees, after long-continued and repeated efforts, wholly failed to secure sales for the said lands at prices sufficient to pay the preferred claims and those secured by the liens on the lands.

"15. It has not been claimed at any time that either the Moody & Son mortgage or the Century Savings Bank mortgage could be or should be avoided as unlawful preference. *But the case has been treated and submitted to the Court as presenting the only question as to those mortgages as a question of priority* and marshalling the proceeds.

"By reason of the foregoing facts the Court adopts the following as

CONCLUSIONS OF LAW.

"1. The Iowa statutes allow the head of a family forty acres of land (outside of a town or city) and all buildings thereon as a homestead, regardless of value. Such a homestead is liable for the debts of the debtor, the head of the family, in this case Oscar M. Hartzell, only to the extent:

A.

"Such debts as were created prior to the acquisition of the homestead. In this case there are no such debts.

B.

"When the debt is secured by mortgage covering the homestead, and such mortgage is but one instrument and signed by both husband and wife. Code 1897, Section 2974.

"2. In the case at bar, Mrs. Johnson's mortgage for $40,580.83 was a first and valid lien on the entire tract of 960 acres, including the homestead forty acres. And the said mortgage was carried forward and continued to be the first and valid lien on the entire fund of $64,253.00 realized from the sale of said 960 acres of land sold to Meade.

"3. If said Johnson mortgage had been foreclosed, and said lien enforced as against Hartzell and wife, when occupying the homestead, with Moody & Son and the Century Savings Bank as junior lien-holders, parties defendant, there would and should have been a decree that the 920 acres would have been first sold to satisfy the mortgage lien, and any deficiency only taken by sale of the homestead forty acres.

"4. But such result as stated in conclusion 3 would only have been decreed if Hartzell and wife had pleaded such fact of the said forty acres being the homestead and such being the fact. In the absence of such fact being pleaded, the decree would have been that the entire 960 acres would be sold to satisfy such debt to Mrs. Johnson.

"5. In this case Mr. and Mrs. Hartzell abandoned their homestead and by conveyance relinquished their homestead and thereby consented to this Court taking jurisdiction of and over the homestead forty acres, and on and after such abandonment such homestead rights were at an end.

"6. When this Court did thus take and acquire jurisdiction of and over all of said lands, and did direct the sale thereof, and the same was sold to Meade for $64,253.00, the Johnson mortgage rested on the entire sum, and proportionately on $8,000.00 realized from the homestead.

"7. The Court concludes and holds that the $8,000.00 received from and on account of the sale of the homestead should proportionately be used to pay off the Johnson mortgage proportionately to the entire sum received from the sale of 960 acres. So that the Court holds that $5,052.63 of the proceeds of the sale of the homestead should be applied on the Johnson mortgage, and the balance from the sale of the other 920 acres, viz.: $35,528.20.

"The conclusion is that $5,052.63 of the homestead money should be applied on the Johnson mortgage. This leaves $2,947.27 to be otherwise applied.

"8. The Moody mortgage was next in point of time. The Century Savings Bank mortgage was executed after the execution and recording of the Moody mortgage.

"9. The Moody mortgage was void as to the homestead forty acres, because Hartzell alone signed it, his wife not joining. But it was a valid lien, and junior only to the Johnson mortgage, on the remaining 920 acres. Code 1897, Section 2974.

"10. The Century Savings Bank mortgage, signed by both Hartzell and wife, was and is prior to the Moody mortgage as to the homestead forty acres, and the money realized therefrom. And as a conclusion of law, the holding is that the Century Savings Bank will be paid $2,947.27.

"11. The balance of the money on hand will be paid to Moody & Son, viz.: $10,736.67."

And the following decree was entered (Transcript, p. 21):

"This case was heretofore fully argued and submitted to the Court on the report of the Master and the exceptions thereto, and on all the evidence and records of the case, and was by the Court taken under advisement.

"The motion of Century Savings Bank for an order to direct Crawford, administrator of estate of Johnson, deceased, is withdrawn.

"And now at this time, the Court being advised, makes findings of fact and adopts conclusions of law, and the same are now ordered of record and are made a part of this decree. And although the Court in large part concurs with the Master as to the facts, and in part does not, the said report of the Master is set aside. The exceptions of Century Savings Bank to said conclusions of law are overruled.

"Pursuant to the findings of the Court and the conclusions now made of record, it is ordered, adjudged and decreed that the trustees of this estate pay to S. F. Prouty, the attorney of record for Moody & Son, and for the benefit of Moody & Son, the sum of $10,736.67, which check will be countersigned by a judge of this Court. It is further ordered, adjudged, and decreed that the trustees pay to W. G. Harvison, the attorney of record for the Century Savings Bank, and for the use and benefit of the Century Savings Bank, the sum of $2,947.27. Each party excepts.

"Thereupon the Century Savings Bank in open court gives notice of appeal. But as in any event the Century Savings Bank concedes that Moody & Son will be entitled to receive the sum of $5,683.94, said sum will be paid on account to Moody & Son by check signed by trustees and countersigned as aforesaid, payable to said Prouty for use of Moody & Son.

"Done in open court this May 24, 1912."

From this decree the Century Savings Bank prosecuted an appeal to the United States Circuit Court of Appeals for the Eighth Circuit, to which appeal the trustees in bankruptcy were not made parties.

The Circuit Court of Appeals reversed the District Court and filed the following opinion therein:

(Reported in Vol. 204, p. 963.)

> "This case involves the marshalling of the liens of three mortgagees. Omitting a number of facts which serve only to confuse, the situation in its last analysis was this: The common debtor mortgaged to Johnson nine hundred and sixty acres of land in Iowa. Embraced in the land was his homestead of forty acres. He next mortgaged the nine hundred and twenty acres exclusive of his homestead to Moody. Then he mortgaged the whole nine hundred and sixty acres to the appellant, the Bank. Upon judicial sale the lands were so sold that the proceeds of the homestead and non-homestead portions were distinguishable. The total proceeds were more than enough to pay Johnson but the surplus was not enough for Moody and the Bank. As Moody had no lien on the homestead and the Bank had, the amounts they would receive depended on how Johnson, the first mortgagee, was paid—whether proportionately from the homestead and non-homestead proceeds or entirely from the latter. In other words, if Johnson with his first lien on two funds was paid in part from that which was not available to Moody it would operate *pro tanto* to the advantage of the latter and correspondingly to the disadvantage of the Bank. The trial court adopted that plan. It directed payment to Johnson from the proceeds of the homestead and the non-homestead property proportionately. This enlarged the surplus in the latter fund for Moody by about $5,000.
>
> "If neither tract had been a homestead there would be precedent for the action of the court, Green v. Ram-

age, 18 Ohio, 428, but the homestead element can not be disregarded. The debtor and his wife expressly waived their homestead right and consented to the use of the proceeds in paying debts. The effect of this depends upon the State statute which created the right and prescribed its incidents and with respect to which the parties are held to have contracted. Section 2976 of the Iowa Code, 1897, provides that the homestead may be sold 'for debts created by written contract, executed by the persons having power to convey, and expressly stipulating that it is liable therefor, but then only for a deficiency remaining after exhausting all other property pledged by the same contract for the payment of the debt.' In Linscitt v. Lamart, 46 Iowa, 312, the holder of a mortgage upon both homestead and other property purchased the homestead and it was held he had the right, notwithstanding the purchase, to satisfy his claim out of the non-exempt property to the exclusion of junior liens. The sale by the debtor in that case was as complete as abandonment of all right and equity as the waiver and consent in the case at bar. At an early day in Wisconsin it was held that where a mortgage covered a homestead and also other property which was subject to a junior lien the debtor had no right to have the latter exhausted first to preserve his homestead. White v. Polleys, 20 Wis., 503. This decision led to a statute (Laws 1870, ch. 133) very similar to that of Iowa, and the case of Hanson v. Edgar, 34 Wis., 653, arose under it. There was a first mortgage upon 160 acres of land, forty acres of which was a homestead. A second mortgage upon the same land was void as to the homestead because not signed by the debtor's wife, but valid as to the remainder. Upon foreclosure the debtor and his wife made no claim. The second mortgagee insisted that the homestead on which he had no valid lien should be first sold to pay the prior mortgage. He contended that the statute was only for the protection of the debtor and was not designed to affect equities between creditors and mortgagees when the debtor was not in-

terested. The court held otherwise. In the later case of Smith v. Wait, 39 Wis., 512, the same rule was applied though the liens were acquired prior to the passage of the statute. The court held that the marshalling of liens according to equitable principles was not a vested right secure from legislative change. We think that in a case like the one at bar the provision of the Iowa statute that resort to the homestead shall be only for a deficiency is mandatory and is not affected by the act of the debtor and his wife after the mortgages are given.

"The case below was in equity and is considered here on the appeal. The writ of error which was also prosecuted is dismissed.

"The order of the District Court is reversed and the matter is remanded for further proceedings in conformity with this opinion.

"Filed April 15, 1913."

A motion to dismiss the appeal for the want of jurisdiction was denied by the Circuit Court of Appeals for the Eighth Circuit, and the decree of the District Court was reversed and the cause was ordered remanded to that court for further proceedings.

Assignment of Errors.

1. The said Circuit Court of Appeals erred in holding that the proceeding in the District Court from which the appeal was prosecuted by the Century Savings Bank in this cause was an independent suit and, therefore, reviewable by appeal.

2. The said Circuit Court of Appeals erred in not holding that the proceeding in said District Court was a "proceeding in bankruptcy" and reviewable only upon petition and notice, under the provisions of Section 24b of the Bankruptcy Act.

3. The said Circuit Court of Appeals erred in not dismissing for want of jurisdiction the appeal of the Century Savings Bank from the decree of said District Court.

4. The said Circuit Court of Appeals erred in reversing the decree of said District Court entered May 24, 1912.

5. The said Circuit Court of Appeals erred in holding that under the provisions of Section 2976 of the Iowa Code of 1897, that resort to the homestead shall be only for a deficiency, is mandatory, and is not affected by the act of the debtor and his wife after the mortgages are given.

The said Robert Moody & Son pray that the decree of the United States Circuit Court of Appeals entered on the 11th day of December, 1913, may be reversed with costs, and that the Honorable Supreme Court of the United States may cause to be done what it may deem right and proper in the premises.

Brief and Argument.

This record presents two questions for the determination of this Court.

1. Whether or not the District Court or the Court of Appeals adopted the correct rule in marshalling and distributing the money derived from the sale of the Hartzell land. This involves the merits of the controversy.

2. Whether or not under the Bankruptcy Act the Century Savings Bank had the right to appeal to the Circuit Court of Appeals from the decision of the District Court. This involves a question of procedure.

We will argue the proposition which involves the merits of the controversy first.

I.

There is no controversy between the attorneys for the appellant and appellee that the rule adopted by the District

Court was the correct one in the absence of Sec. 2976 of the Code of Iowa of 1897, which provides that the homestead may be sold "for debts created by written contract executed by the persons having power to convey, and expressly stipulating that it is liable therefor, but then only for a deficiency remaining after exhausting all other property pledged by the same contract for the payment of the debt."

It is the contention of the appellee and sustained by the Court of Appeals that this statute abrogates and sets aside the equitable rules for marshalling assets. We concede that if the mortgagor was living upon his homestead and claiming it, he would have the right to have the property other than the homestead first sold to pay the Johnson mortgage. But we claim that the rights of the homesteader are not involved in this controversy, (1) because by executing the three mortgages on his property he created a condition under which no court could so marshal the assets as to protect his homestead, and (2) because by a properly executed deed, signed by himself and wife, he absolutely relinquished all rights to his homestead and left it in a position where the proceeds of the entire tract of land could be marshalled irrespective of his interest or that of his wife. The precise question involved here has never been determined by the court of last resort in Iowa so that it is one for the independent judgment of the Federal Court. It is our contention, however, that the trend of the Iowa decisions is opposed to that of the Circuit Court of Appeals and supports the view taken by the District Court.

While it is true that under the statute, as to the first mortgage (to Johnson) the homestead would be liable only for a deficiency, it is also true that such provision was applicable only in the event a homestead actually existed at the time of the enforcement of the lien. If none of the land

covered by that mortgage constituted a homestead at the time of the sale all of it might be sold regardless of the fact that some of it had previously been a homestead. In other words, the homestead was a defeasible right in the owner of the property and it remained homestead just so long as the beneficiaries (the family) desired to continue it as such. Any act, therefore, which destroyed the homestead character of the property also rendered inapplicable the statutory provision with reference thereto. So abandonment by the selection of another homestead, a conveyance of the absolute fee by the husband and wife, or a waiver in writing of the homestead by husband and wife would place the property in the same condition as other non-homestead property. And thus it was held in Davis, Moody & Co. v. Kelley, 14 Iowa, 523, that if

> "there has been an actual and clear abandonment of the premises, then they stand like any other property, and may be incumbered by a like instrument."

Appellee contends, however, that because of the execution of the mortgage to it that it stands in the place of the mortgagor and may assert the homestead exemption which might otherwise have been claimed by the mortgagor. This position is wholly untenable and we do not believe can be supported either by reason or authority. The appellee did not have an absolute conveyance of the homestead property which would raise equities in its favor as against the former owner, but it simply had a lien upon it and the other property of the mortgagor. It was not deceived in any way because it knew when it took the mortgage that the statutes of Iowa permitted a change of homestead, an abandonment thereof by waiver or otherwise, and that the action of the mortgagor and his wife at any time would render the whole

of the property subject to sale as non-homestead property.

In the case of Dilger v. Palmer, 60 Iowa, l. c. 121, it is said:

> "The statute undoubtedly was enacted *for the benefit of the owner* of the homestead, and, like other provisions of law, *may be waived by him.*"

The fact that the mortgagor and his wife waived the homestead right was in effect the same as the selection of a new homestead which would have destroyed the old and since the statute expressly authorized such a change of homestead, it must have been intended that the status of the property at the time of the enforcement of the lien controlled the operation of the statute. If this were not so, one might acquire innumerable homesteads and when it was sought to enforce liens against them claim exemption as to each on the ground that they had theretofore been clothed with the attributes of a homestead and thus were exempt from the enforcement of the liens.

The Supreme Court of Iowa held in the case of Furman v. Dewell, 35 Iowa, 170, that where a judgment debtor moved from one parcel of land to another after the docketing of the judgment, but both of which parcels he owned before, the lien was enforceable against the old homestead only.

But further, the appellee in the present case is in no position to assert any exemption which might at one time have existed with reference to the homestead property, because its rights are no greater or stronger than would be those of a purchaser of the homestead. Thus in Barker v. Rollins, 30 Iowa l. c., 413, which was a case in which one Coggshall, the purchaser of a piece of property which was the owner's homestead, and which Coggshall in turn was claiming as

his homestead, and upon which there was a mortgage at the time of the purchase by him, insisted that the debtor's other property be exhausted before resort was had to the homestead property so purchased by him. The maker of the note and mortgage made no defense, but the court said:

> "The difficulty with defendant Coggshall is, that he is not *the debtor*, and is not within the language or the spirit of the section quoted. His homestead was not within the contemplation of the parties to the contract sued on. The creditor might well be held to have contracted with reference to all the phases of homestead claimed by his debtor; but not as to any such claim by third parties, who should voluntarily purchase the property with full knowledge of the incumbrance upon it."

This, of course, was a case where the homestead only was mortgaged, but under the statute as it then existed the non-homestead property of the mortgagor, although not covered by the mortgage, was required to be sold before the mortgaged homestead might be sold. It was not within the power of the owner either to convey or otherwise confer upon a third person any of the rights acquired by him under the statute. *The rights so conferred were purely personal.* The statute does not pretend to create an estate, but simply attempts to confer upon the owner an exemption. (Burns v. Keas, 21 Iowa, 1. c. 259) or a valuable right (Sayers v. Childers, 112 Iowa, 677, 680) for the purpose of securing to him a place of abode safe from eviction by his creditors.

The Supreme Court of Iowa in the case of Dilger v. Palmer, 60 Iowa, 117, held that where a mortgage is executed on the homestead and other real estate, and, before foreclosure, the mortgagor sells and conveys the other real estate and a part of the homestead to others, he can not

insist, in a foreclosure proceeding, that the property so sold and conveyed by him shall be first exhausted, before that part of the homestead which he retains shall be sold, to pay the mortgage debt—that the words 'other property' in said section must be limited to property *which belongs to the mortgagor at the time of foreclosure.*"

If the statute relates back to the date of the execution of the mortgage and if, as is held by the Court of Appeals, the statute is mandatory, upon what theory could the Supreme Court of Iowa have reached such conclusion? We earnestly submit that under the doctrine of this case it must be held that the Iowa Court recognized the construction for which we contend, that the status of the property at the time of the sale determines the rights and liabilities of the parties and if at that time all of the property subject to the mortgage is non-exempt property then the whole of it may be sold regardless of the statute.

If this is not correct then the Supreme Court of Iowa erred in its decision of the above case, because if the character which the property had at the date of the execution of the mortgage controlled, then, if the statute is mandatory, it would have been necessary to sell all of the non-homestead property before any portion of the homestead could be sold.

The Court of Appeals based its decision upon the construction placed upon a similar Wisconsin statute in the case of Hanson v. Edgar, 34 Wis., 653. In this case a second mortgagee, whose lien was good as against non-homestead property only, sought to compel the first mortgagee whose lien covered both the homestead and non-homestead property to first resort to that upon which he had no lien.

A careful consideration of this case will convince that it supports the view we contend for. The court states in this case:

"It appears that the plaintiff is foreclosing in this action a prior mortgage given by Jacob Nelson and wife on 160 acres of land, 40 acres of which Nelson occupied at the time of the execution of the mortgage, *and still occupies as a homestead.* * * * The question is argued by counsel for Edgar as though this case were a matter wholly between different lien holders. *But other rights intervene.* It is a mistake to say that the debtor claims no rights. He surely claimed the benefit of the homestead."

There is a marked distinction, therefore, between the Wisconsin case and the case at bar. In the former the mortgagor was asserting the right to his homestead and the homestead existed at the time of the foreclosure, while in the present case the homestead did not exist because the exemption or right of homestead was expressly waived and the controversy resolved itself into one wholly between different lien holders.

It seems so obvious to us as to hardly admit of contradiction that when the right has ceased to exist which the statute was intended to protect, the statute becomes a nullity so far as the particular right is concerned. If no right came into existence there would be nothing to which the statute could apply and likewise when a right ceased to exist the statute with reference thereto ceased to apply.

Statutes such as the one under consideration, as we have heretofore stated, and as courts have held repeatedly, are intended to secure a place of abode for the family, but any act of the occupant which operates as an abandonment for such purpose, takes from the property the protection of the statutes and places it in the same category as other property.

The Supreme Court of Wisconsin in a much later case than the one above referred to clearly recognizes this, for

in the case of Godfrey v. Thornton and others, 46 Wis., 677, 683, it said:

> "The law has not hitherto undertaken to prohibit a husband to change his domicile without his wife's consent, or to release the wife from her reasonable duty to accompany her husband upon his change of domicile. Gleason v. Gleason, 4 Wis., 64. Upon such change, the husband's former place of residence ceases to be a homestead, and he may mortgage or convey it without his wife's signature, subject to her inchoate right of dower. The husband can not, by his own act, divest his wife's right of dower, because it is an estate. But he can, by his own act, free himself from his disability to mortgage or convey his homestead without the signature of his wife, because his disability vests no estate in her, and this is the plainer because the husband abandoning his homestead and so freeing himself from his disability to alienate it, has no duty imposed upon him to acquire another to which the disability would attach."

If, therefore, as in effect held by the Circuit Court of Appeals, once a homestead always a homestead, how can the other statutes of Iowa permitting a change of homestead be of any effect or how could the homestead lose its character as such under the Wisconsin statute as was held in the case last referred to?

We submit that the statute was intended to apply to a condition existing at the time the enforcement of the lien is sought and not to some anterior period and that, therefore, if there is no property at that time to which the statute applies, all of the property is upon the same basis and as though none of it had ever been within the terms of the statute.

If none of the property of the bankrupt came within the provisions of the Iowa statute the case was one for the ap-

plication of the equitable doctrine of marshalling assets, and as between Johnson and Moody, Moody would have a right to first require the exhausting of the property on which homestead formerly existed by the Johnson mortgage before resorting to the fund or property upon which they had a common lien.

In Pomeroy's Equity Jurisprudence (3d ed.), Section 396, it is said:

> " 'If a person has two real estate mortgages both to one person, and afterwards only one estate to a second mortgagee, the court, in order to relieve the second mortgagee has directed the first to take his satisfaction out of that estate only which is not in mortgage to the second mortgagee, if that is sufficient to satisfy the first mortgage, in order to make room for the second mortgage. The same rule applies wherever one has any lien or security on two funds, and another has a subsequent lien on only one of them. This doctrine is plainly referable to the principle. The holder of the security on two funds is compelled to shape his own remedy, so as to preserve, if possible, the equity of the one whose lien extends to but one fund."

The doctrine thus announced by Pomeroy is that which generally prevails and is the rule followed by the courts of Iowa. It is stated in *In re* Assignment of Hobson, 81 Iowa, 392, as follows:

> "If one party has a lien on or interest in two funds for a debt, and another party has a lien on or interest in one only of the funds for another debt, the latter has a right in equity to compel the former to resort to the other fund in the first instance for satisfaction, if that course is necessary for the satisfaction of the claim of both parties, whenever it will not trench upon the rights or operate to the prejudice of the party entitled to the double fund."

Applying this rule to the Johnson and Moody mortgages, Moody would clearly be entitled to have the Johnson mortgage first exhaust that part of the property which had constituted the homestead and upon which Moody had no mortgage before Johnson could resort to the non-homestead land upon which he had a posterior mortgage. If the Century Bank had never taken a mortgage upon the premises equity would clearly have applied this rule in the distribution of the assets.

There is a long line of authorities holding that if the subsequent lien holder took his mortgage after the rights of the second mortgagee had accrued, the subsequent or third mortgage would not affect the rights of the second mortgagee as they existed at the time of the acquisition of his mortgage. There is, however, another long line of cases holding that the right to marshal assets is not a fixed right and is, therefore, more or less shifting to adapt itself to subsequent as well as to prior equities. The District Court adopted the latter rule in this case because the strict application of the former rule would have entirely deprived the Century Savings Bank of its security. The case of Green v. Ramage, 18 Ohio Rep., 428, 51 Am. Dec., 458, announces accurately the rule adopted by the trial court. That was a bill in equity to compel defendant Wilson, to whom defendant Ramage had mortgaged two blocks in the town of Zanesville, known as lots 14 and 39, to exhaust his security out of lot 39 before proceeding against the other. It appearing that subsequent to the mortgage to Wilson, Ramage mortgaged lot 14 to plaintiff Green and afterwards mortgaged it to the defendant Hiller. The court said:

> "If there were but two mortgages on the property, Wilson and Green's, Green would, without doubt, be entitled to the relief which he claims. In Story's Equity, Vol. 1, Sec. 633, the rule on the subject of

marshalling securities is stated thus: 'If one party has a lien or interest in two funds for a debt, and another party has a lien on, or interest in, only one of the funds for another debt, the latter has a right in equity to compel the former to resort to the other fund in the first instance for satisfaction if that course is necessary for the satisfaction of the claim of both parties, whenever it will not trench upon the rights or operate to the prejudice of the party entitled to the double fund.'

"In this case, however, there were three parties interested. If Green should compel Wilson to exhaust Lot 39 before he comes on Lot 14, then Green will have the benefit of the fund derived from Lot 39, although he took no security on it. But Hillier, by this arrangement, will be deprived entirely of his security on Lot 39, although he took a mortgage on it.

"We think the rule can not be applied in a case of this kind. The principle is one established for the purpose of securing the parties the rights to which upon the principles of natural justice they are entitled. To deprive Hillier of his security, in this way, would be manifestly unjust. When Green took his mortgage he had notice of the mortgage of Wilson on Lot 14; when Hillier took his mortgage on Lot 39, he had notice only of the lien of Wilson which was all the encumbrance on it. There was nothing connected with Wilson's lien that was even calculated to put him on inquiry in reference to Wilson's mortgage on Lot 14, because Wilson's liens on these two lots were created by separate instruments. But if Wilson's lien on the two lots had been created by a single mortgage, Hillier was not bound to notice the situation of Lot 14, having nothing to do with it. We think, then, that justice between Hillier and Green requires that each should have the full benefit of his mortgage and this can only be done by *requiring Wilson to take his debt out of the proceeds of both lots proportionate to the amount each lot may produce.*"

This rule is adopted and followed in the case of *Richards vs. Cowles,* 105 Iowa, 741. If the court had applied the first rule, then the homestead would have been entirely exhausted in the payment of the Johnson mortgage, and would have entirely cut out the rights of the Century Bank's mortgage, which it must be conceded would be hardly fair under the broad rules of equity. The counsel for the Century Bank are contending in this case for a rule equally harsh and inequitable. They wish to take off a mortgage from the homestead that was on there when the Century Bank took its mortgage, so as to clear the property for them and put this additional burden on the non-homestead land so as to diminish the security that Moody & Son had on it. The real effect of this rule would be to make the Century Bank's third mortgage prior and superior in fact to Moody's second mortgage. We make the statement without fear of contradiction that no other court has ever adopted the rule, as contended for by counsel for the Century Savings Bank. The only question in which there is a conflict of authorities is as to whether or not the second mortgagee has the right to require the exhausting of the homestead fund entirely by the Johnson mortgage, or whether in equity the burden should be equitably distributed over all the property in proportion to its value. The District Court adopted this rule and distributed the burden of the Johnson mortgage over all the property on which it was a lien in proportion to its value. This perhaps under the circumstances of the case was fair. In any event, it was the most liberal rule that the court could adopt as affecting the Century Savings Bank claim. No courts have gone farther.

Analysis of Hanson v. Edgar, 34 Wis., and Smith v. Wait, 39 Wis.

It will be noted that the decision of the Circuit Court of Appeals reversing the District Court is based entirely upon

the Wisconsin cases of Hanson v. Edgar, 34 Wis., 653, and Smith v. Wait, 39 Wis., 512. A careful examination of these cases will clearly show that they do not in the least interfere with the rule adopted by the District Court. Neither the facts nor the rule of law announced in these decisions are applicable to the case at bar. It seems really strange that an able court should have overlooked the distinction that is so clearly apparent. The decisions already cited in this brief show that the only purpose of the homestead law is to protect the homestead for the benefit of the homesteader, his wife and family. Every court, State and National, that has considered this question has so declared. All the decisions hold that the homestead right is a personal one to be available only for the use, benefit and protection of the homesteader, and courts of equity have only modified the general rule for marshalling of assets for the purpose of protecting this right and have never applied it for the purpose of giving advantage between contending lien holders. An examination of these two cases will show that that was the view of that learned court.

In the case of Hanson v. Edgar, 34 Wis., 653, Nelson and wife executed a mortgage on 160 acres of land, 40 acres of which was a homestead. He subsequently executed a mortgage to Edgar on the same land, in which his wife did not join. The effect of this, like the one at bar, was to make it no lien upon the 40-acre homestead. Edgar answered, setting up his lien and asking that the homestead be first sold to apply on the first mortgage so as to lighten the burden of the first mortgage on the land on which he held a valid mortgage. He sought to invoke the equitable rule that where a creditor had a claim upon two funds on one of which another person has a claim a court of equity will compel the creditor to take satisfaction out of the fund upon which he alone has a claim when such other person

would be prejudiced by allowing the creditor to satisfy his lien out of the fund subject to both claims. It will be noticed that if the court adopted this rule under the facts of that case, that the effect of it would be to exhaust the homestead and deprive him of it to the advantage of the lien holder. All the court holds in this case is that the equitable rule can not be made available when it will thus deprive the homesteader of his right, where there is a statute like the one in Wisconsin or in Iowa requiring that the property other than the homestead shall first be exhausted. In other words, the court recognizes the rule that the homestead law is made for the protection of the homesteader and courts of equity will not apply rules that will deprive the homesteader of that right to the advantage of the lien holder.

In the case at bar there is no possible application of equitable rules that could be applied by the court to protect the homestead right even in the absence of an express waiver. It will be noted that there are three mortgages in the case at bar instead of two as in the Hanson case. In the Hanson case, if the court so marshalled the assets as to require the first mortgage to be exhausted out of the homestead it would exhaust the homestead and leave Edgar's mortgage a valid lien upon the remaining property. If the court adopted the rule as it did of requiring the property other than the homestead to be exhausted by the first mortgage, it then left the homestead free because Edgar had no mortgage on the homestead. This is the correct application of the rule. The Wisconsin statute and the Iowa statute are in effect the same and there is no question but that under either statutes the rule adopted in the Hanson-Edgar case is correct under the facts in that case. But in the case at bar whatever rule the court adopts would exhaust the homestead. If the Johnson, or first mortgage, does not take it the third mortgage does, so this case is clearly a controversy

between lien holders. The rights of the homesteader are not involved or affected. The court in the Hanson-Edgar case clearly intimates that if such were the case that there would be no occasion for applying the rule that they did. In the case the court says:

> "The question is argued by the counsel for Edgar as though this was a matter wholly between different lien owners. But other rights intervene. It is a mistake to say that the debtor claims no rights. He surely claimed the benefit of the homestead. It must be presumed that when Edgar took his mortgage he knew of the law of 1870 and of all the rights which that statute secured the debtor on a foreclosure and sale under plaintiff's mortgage."

In this excerpt the court makes it clear that the statute of 1870, which is similar to the Iowa statute, was designed not to affect the equities between lien holders, but to protect the homesteader. But in the case at bar the homesteader is not only deprived of his right by the situation, but he expressly waives it. He and his wife signed a deed expressly waiving any claim to the homestead, so that leaves this controversy entirely between lien holders with no rights of the homesteader involved.

The force of this Hanson-Edgar case will be more clearly brought to light by the fact that it overruled the case of White v. Polleys, 20 Wis., 503. In that case the court had held that where there was a first mortgage covering a homestead and another property and a mortgage on the remaining property, that between these two lien holders the court applied the ordinary rules of marshalling of assets even though the effect of it was to deprive the homesteader of his homestead. That decision, however, was rendered before the statute of 1870 requiring the other lands to be first sold,

and the court in the Hanson case adopted the policy of the statute which was made for the purpose of protecting the homestead. In the opinion the court says:

> "For it can not be denied that in all enactments found in our statute books in regard to homestead exemption, the most sedulous care is manifest to secure the homestead to the *debtor* and to his wife and family, against all debts not expressly charged upon it. And it would be in direct conflict with the spirit of this legislation to hold that the act of 1870 was designed to protect the debtor only on the foreclosure of a single mortgage, and did not apply to a case like the one before us."

We think the rule adopted in the Hanson-Edgar case is undoubtedly sound and correct. That is to say, that a court would not marshal assets in such a way as to deprive the homesteader of his homestead by the mere application of equitable marshalling. Edgar had no mortgage on the homestead and he had no equitable right to have the assets so marshalled that in fact he secured the benefits of another mortgage.

But in the case at bar, Hartzell had created a situation that must from necessity exhaust his homestead. He had put mortgages on the land far in excess of its value. Two of these were a valid lien on the homestead and under any rule of marshalling of assets that might be adopted by a court of equity his homestead would have been exhausted entirely independent of an express waiver subsequently made.

The other case relied upon and cited by the Court of Appeals as a justification for overruling the decision of the lower court is Smith v. Wait, reported in 39 Wis., 512. An examination of this case will show exactly the legal situation involved in the case of Hanson v. Edgar. In this case the

defendant, Wait, and her husband had executed a mortgage to the plaintiff, Smith, upon four lots, one of which, Lot 7, was claimed by the mortgagor as a homestead. The defendant, Lightbody, claimed that the homestead on which he had no lien should first be exhausted to satisfy the first mortgage before resorting to the other three lots upon which he had a common lien, and asked the application of the common equitable doctrine. It can be seen at once that the effect of the application of this doctrine would have been to deprive the said Wait and her husband of their homestead by exhausting it in payment of the first mortgage. Lightbody asked the application of the rule applied in White v. Polleys, 20 Wis., 503. This mortgage had been given, as it will be noted, prior to the passage of the statute of 1870 and therefore he contended that he was not governed by the rule announced by the statute. But the court holds that the marshalling of assets is a mere equitable rule and that the court should adapt its decisions to the general policy of the State as declared by the statute, and that the act of 1870 was clearly intended to correct the rule that had been adopted in White v. Polleys. The court says:

> "In other words, the right rested in the sound judicial discretion of the chancellor, and was not an absolute rule of law. The law of 1870 has certainly changed this equitable doctrine in respect to homesteads, so far as mortgages are concerned executed after its passage. And in deference to the policy of that statute, it is the duty of a court of equity to favor the homestead right as against the equities of creditors arising under the former rule. In the present case the Circuit Court ordered the homestead to be first sold to satisfy the plaintiff's mortgage, in order to *benefit Lightbody*, who had taken an imperfect security. This we think was error, and must work a reversal of the judgment."

It will thus be noticed that in that case the Supreme Court of Wisconsin only sought to protect the rights of the homesteader. It is not intimated in the case that it is intended or designed to affect the rules of equity in the marshalling of assets as between lien holders. We are wholly at a loss to see what basis can be found by the Circuit Court of Appeals in either of these cases for changing the rule laid down by the District Court in its distribution of the assets of the Hartzell land.

That the Supreme Court of Wisconsin only intended to apply the rule announced in Hanson v. Edgar in cases in which the homesteader still occupied and claimed his homestead is shown by review of the subsequent decisions. There has never been an intimation in the decisions of the Supreme Court of that State that it was intended to affect the rights of lien holders independent of the right of the homesteader.

The case of Whitney v. Traynor, 74 Wis., 286, which applies the rule in the Hanson case, bases it clearly upon the ground that the homestead was still being occupied and claimed. On page 297 the court says:

> "Because (as the Circuit Court found) the heirs of Philip are still occupying the land as a homestead the same should be last sold on the foreclosure sale if any of the defendants so desire." Citing Hanson v. Edgar and Smith v. Wait.

It will thus be noticed that the rule was made dependent on the proposition of "still occupying the land as a homestead."

In the case of Rozech v. Redzinske, *et al.*, 87 Wis., 525, the court makes the application of the rule dependent upon the occupancy of the homestead. On page 527 the court says:

"The said Katayzna thereafter occupied the same homestead 40 as a homestead."

In the case of Chancey v. Alme and Wife, 98 Wis., 229, where the rule in the Hanson case is again invoked, the court says:

"The right of *the owner* to have his homestead exempt from liability in any form is superior to the equity of a creditor to have it apply to the payment of his debt." Page 230.

In Larson v. Oisefos, 118 Wis., 398, where the rule in the Hanson case is approved, the court says:

"The rights of the *owner* of the homestead in such circumstances exist by force of statute."

In Re Barrett's Estate, cited in 140 Federal Reporter, 562, the rule in the Hanson case is recognized and applied. In applying the rule the court says:

"The bankrupt owns 25 acres of land and she claims the same as exempt as a homestead."

In the case of Fink v. O'Niel, 1 Supreme Court, 327, the rule in the Hanson case was cited and approved, but in that case the homesteader was still occupying and claiming the homestead and claiming the benefit of the statute for his own protection.

After a somewhat exhaustive examination of the authorities we feel safe in saying that no court, either in Wisconsin or elsewhere, has given to a statute like this the force of affecting the right between lien holders when they did not affect the rights of the homestead. We respectfully submit that the rule adopted by the trial court was an

equitable one founded both upon reason and authority, and that its action should have been sustained.

II. Right of Appeal.

Of the jurisdiction of the Circuit Court of Appeals.

Assignments of Error Nos. 1 to 3, inclusive, have reference to the jurisdiction of the Circuit Court of Appeals, and, therefore, may be discussed together.

As has been pointed out in the statement of the case, this proceeding arose out of an order of the Court of Bankruptcy directing the parties interested to show cause why a sale of the property should not be made. The trustees in bankruptcy in their petition for the order set out all the facts, recognized the validity of each of the liens and made no claim whatever to any part of the property as against the liens and made no endeavor to secure any part of the proceeds for the general creditors. The controversy out of which this appeal rises is one between two of the lien creditors and in which neither the trustees nor any of the other creditors have any interest whatever.

The appellants in the present appeal contended in the Court of Appeals, as they contend here, that the proceeding in the District Court was a "proceeding in bankruptcy"; that not being one of the classes in which an appeal may be taken under the provisions of section 25a of the bankruptcy act, its review could only be sought by notice and petition under the provisions of section 24b, and, therefore, that the Court of Appeals was without jurisdiction to consider the case upon an appeal.

The Judicial Code, which was in force at the time the appeal in this case was prosecuted to the Court of Appeals, provides:

> "Section 130. The Circuit Courts of Appeals shall have the appellate and supervisory jurisdiction conferred upon them by the act entitled 'An act to establish a uniform system of bankruptcy throughout the United States,' approved July first, eighteen hundred and ninety-eight, and all laws amendatory thereof, *and shall exercise the same in the manner therein prescribed.*"

Unless the jurisdiction of those courts is invoked "in the manner therein prescribed," they are without jurisdiction to review decrees in bankruptcy proceedings. They can not review on petition to revise a decree allowing or rejecting a claim of five hundred dollars or over, nor can they entertain an appeal from a decree in any "proceeding in bankruptcy" not specially provided for by Section 25a. The same rule applies with reference to their jurisdiction conferred by the bankruptcy act that is applicable to their other jurisdiction and which forbids review of a decree in equity by writ of error and denies the right to review a judgment at law upon an appeal.

Section 23 (a) of the bankruptcy act provides:

> "Section 23 (a). The United States Circuit Courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, *between trustees as such and adverse claimants* concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupt and such adverse claimants."

The language of this section seems to exclude any action which does not involve rights between the trustee and an adverse claimant and such proceedings are, *ex necessitate*, proceedings in bankruptcy.

In the case of Thompson v. Mauzy, 174 Fed., 611, 614, the Circuit Court of Appeals for the Fourth Circuit, in defining proceedings in bankruptcy, states:

> "The latter being confined to those questions arising between the bankrupt and his creditors which are the very subject of such administrative orders and judgments, from the petition for adjudication to the discharge, and including the intermediate administrative steps, *and such controversies as arise between parties to the bankruptcy proceedings* as are involved in the allowance of claims, fixing their priorities, sales, allowances, and other matters to be disposed of summarily."

And in Snow v. Dalton, 203 Fed., 843, 845, the same court states:

> "This is the case of a dispute between parties to the bankruptcy proceedings as to their respective rights to participate in the proceeds of an admittedly valid security, and we hold belongs in the category of 'Proceedings in Bankruptcy.'"

At the time the Judicial Code was adopted containing the provision that the jurisdiction of the Courts of Appeals should be exercised "in the manner" prescribed by the bankruptcy act Congress had the benefit of the construction placed upon that act by the decisions of this Honorable Court theretofore rendered. If it had intended to place a different construction upon the act it would not have inserted the sentence "and shall exercise the same in the manner therein prescribed." Accordingly it is our contention that since jurisdiction by appeal is granted only in the cases enumerated in Sections 24a and 25a of the bankruptcy act, the Courts of Appeals are wholly without jurisdiction to review by appeal any case that does not come within the provisions of those sections.

This Honorable Court in the case of First National Bank v. Title & Trust Company, 198 U. S., 280, 291, rendered long prior to the adoption of the Judicial Code, said:

> "If the proceeding in the District Court was a proceeding in bankruptcy and not an independent suit, no appeal lay to the Circuit Court of Appeals, and the jurisdiction of that court was confined to revision in matter of law 'on due notice and petition' under clause b of Section 24." * * * "Being such, an appeal from the decree of the District Court under Section 25a did not lie, and parties aggrieved could only invoke supervisory power under Section 24b."

What is the "independent suit" referred to in that decision? Obviously it is the "controversies arising in bankruptcy proceedings" referred to in Section 23 between the trustee and an adverse claimant, since that is the only one designated by the bankruptcy act. *Expressio unius, est exclusio alterius,* and consequently, a contest to a fund between two creditors and to which fund the trustees make no claim is not the independent suit referred to.

There was no assertion by the appellee, Century Savings Bank, of an independent and superior title as against the trustees in the present case, nor did the trustees assert any claim to the fund realized from the sale of the property. *The sole question was as to the distribution of a fund between two holders of liens, the validity of whose liens was unquestioned by the trustees.*

The District Court in its findings (paragraph 15, Record, p. 19, also found on p. 8 of this brief) states:

> "It has not been claimed at any time that either the Moody & Son mortgage or the Century Savings Bank mortgage could be or should be avoided as unlawful preference. *But the case has been treated and submitted*

to the court as presenting the only question as to those mortgages as a question of priority and marshalling the proceeds."

The parties here, both appellants and appellee, had each an unquestioned lien upon the property. The possession was in the bankrupt at the time of the adjudication. The District Court, in passing upon the petition of the trustees and entering the order commanding the lien holders to show cause why such petition should not be granted, and in directing a sale of the property, was acting as a Court of Bankruptcy. It was exercising the power conferred upon it to collect the assets of the bankrupt. It is stated in paragraph 14 of its findings (Record, p. 19, also found on p. 8 of this brief):

> "When this court took jurisdiction of and made orders relative to said lands it was believed that there existed equities of considerable sums for creditors other than lien holders and those having preferred claims."

The fact that the property was sold did not change the situation. The proceeds stood in place of the property. First National Bank v. Title & Trust Co., 198 U. S., l. c. 291.

Unlike the cases of Hewitt v. Berlin Machine Works, 194 U. S., 296; York Manufacturing Company v. Cassell, 201 U. S., 344; Security Warehousing Co. v. Hand, 206 U. S., 415, and Houghton, Trustee, v. Burden, 228 U. S., 161, this was not an intervention in the bankruptcy proceeding for the purpose of asserting an independent and superior title to the property held by the trustees, nor was it a contest over a claim with incidental assertion of a lien as in Coder v. Arts, 213 U. S., 223, *In re* Loving, 224 U. S., 183,

and other similar cases. As already stated, no contention whatever as to the validity of the liens was made, but all of them were recognized as a charge upon the property

In Coder v. Arts, 213 U. S., l. c. 234, it is stated that the character of the proceeding depends upon the manner in which the jurisdiction of the bankruptcy court was invoked for the determination of the rights involved and that the disposition and the "appropriate appellate jurisdiction are to be determined by the provisions of the bankrutcy act governing bankruptcy proceedings."

If the instant case is not a controversy arising in bankruptcy proceedings as defined by Section 23a of the bankruptcy act then no appeal will lie under Section 24a, and if it is not a judgment allowing or rejecting a debt or claim of five hundred dollars or over, no appeal will lie under the provisions of Section 25a. The decree of the District Court did not allow or reject a "claim" in the sense in which that word is used in Section 25a. That section does not mean the allowance or rejection of a mere supposed right, but has reference to the assertion of a debt, a cause of action or moneyed demand.

Barto v. Stewart, 21 Wash., 605; 59 Pac., 480.
In re Whitener, 105 Fed., 180, 186.
Holden v. Stratton, 191 U. S., 115.
Wynkoop v. Gaines, 227 U. S., 4, 8.

There was no need to allow or reject a claim with reference to these liens, because they were admitted and recognized as valid. This leaves then but one way to secure a review, to wit: "on due notice and petition" as provided by Section 24b.

What need was there for these distinct provisions for a review of the orders of the District Court unless it was in-

tended that the jurisdiction of the Appellate Court should be exercised "in the manner therein prescribed"? If Congress intended that appeal should lie from any order, is it not reasonable to suppose that it would have so provided instead of enumerating the distinct course to be pursued with reference to the three classes of cases?

This court, we submit, finally settled any doubt in this regard, in the case of Tefft, Weller & Co. v. Munsuri, 222 U. S., 114, 120, in which it was stated:

> "We think it is evident that as to questions of the character of those presented by this appeal arising in steps in bankruptcy proceedings, the modes of review specifically provided for in the Bankruptcy Act are exclusive."

See also the case of

> *In re* Mueller, 135 Fed., 711, 714, 715, opinion by the late Judge Lurton.

The Court of Appeals based its decision upon the question of jurisdiction on the opinion in the case of Knapp v. Milwaukee Trust Co., 216 U. S., 545. An examination of that case, however, will disclose that it was a plenary action brought by the filing of an intervention to establish the validity of a chattel mortgage which the trustee claimed was fraudulent and void. There was present in that case, then, a controversy between the trustee and an adverse claimant under the provisions of Section 23a, and, therefore, an appeal lay under the terms of Section 24a.

We respectfully submit that under the provisions of the bankruptcy act, Section 130 of the Judicial Code and the decisions of this Honorable Court, the Circuit Court of Appeals for the Eighth Circuit was without jurisdiction to re-

view this case upon appeal, and its decree should accordingly be reversed.

We further respectfully suggest that the appellants presented to this court their petition for a writ of *certiorari* to secure a review of the jurisdictional question, and they now urge that if there is any doubt as to their right to a review on this appeal, that the court will reconsider the petition for writ of *certiorari*.

We respectfully submit that the decision of the Court of Appeals should be reversed with directions for an affirmance of the decree entered by the District Court.

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COST CERTIFICATE.

The true and actual cost of printing the foregoing brief and argument is the sum of ..... Dollars.

S. F. PROUTY,
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Attorneys for Appellant.
Per .....

14

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 364.

ROBERT MOODY & SON, a Co-partnership composed of ROBERT MOODY and THOMAS F. MOODY,
Appellants,

vs.

CENTURY SAVINGS BANK, a Corporation,
Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

REPLY BRIEF OF APPELLANTS.

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Service of three copies of this brief is hereby admitted and acknowledged at Des Moines, Iowa, this _____ day of April, 1915.

_____

Attorneys for Appellee.

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APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

REPLY BRIEF OF APPELLANTS.

In reply to the brief of appellee we will not discuss the questions in the order presented by counsel, but instead will first present what we have to say upon the merits and will then discuss the jurisdiction of this Court upon this appeal, and, lastly, the jurisdiction of the Circuit Court of Appeals upon the appeal from the decree of the District Court.

AS TO THE MERITS.

We stated in our original argument that the only controversy involved on this phase of the case was the effect of the Iowa statute concerning homesteads. To this statement counsel for appellee makes slight objection; but, whatever may be their protestations, a careful analysis of the law and facts will show that the only question of uncertainty or serious dispute arises from the effect of this statute on the general law for marshaling assets.

To make this plain: Suppose there was no question of homestead involved in this controversy; suppose that Johnson had a first mortgage on 960 acres; that Moody & Son had a second mortgage on 920 acres of the same land (all except one forty); that the Century Savings Bank had a mortgage on all of it, which was a second mortgage on the forty and a third mortgage on the 920; suppose that this was the status of the liens that had been made by contract and not by the operation of any law. In other words, that the homestead was not in any way involved. Under that state of facts, under the general law of marshaling assets as between Johnson and Moody & Son in a court of equity Moody & Son would be entitled to have the forty acres on which they had no lien first exhausted before resorting to the 920 acres. As between the Century Savings Bank and Johnson there would be no necessity of calling upon the rule of marshaling of assets because their mortgages cover the same property. The Johnson mortgage was first, with the Century Savings Bank subsequent. The equitable doctrine, however, must be called in when it comes to the determination of the rights between Moody & Son and the Century Savings Bank. If the general equi-

table doctrine was applied that required Johnson to exhaust the homestead before resorting to the other property on which Moody & Son had a second lien the effect of that would be to deprive the Century Savings Bank entirely of their lien on the forty on which it held a mortgage prior and superior to that of Moody & Son.

In determining the equity in such class of cases there are two lines of authorities, one of them holding that the marshaling of assets as between the Johnson mortgage and the Moody & Son mortgage should be applied as if there was no third party involved or interested. These decisions base that rule upon the proposition that as the status of the first and second mortgages was established and fixed prior to the taking of the third mortgage that the taking of that mortgage could in no manner disturb that status. That is, the taking of the third mortgage with the full knowledge of the equitable rights existing between the first and second mortgages could not change that equitable right for marshaling.

On the other hand, there is a long line of decisions holding that this rule of marshaling assets, being a merely equitable one, is subject to modification to meet existing equities, whether prior, concurrent or subsequent. That is to say, that the courts will so marshal the assets as to do substantial justice between all parties; and this was the rule adopted by the District Court. Its decision holds that it would be inequitable to so marshal the assets as to give Moody & Son the real beneficial effect of having a mortgage on the homestead forty, which would be the result if the ordinary rule of marshaling of assets were applied. On the other hand, the Court held it would be inequitable to

so marshal the assets as to remove the burden of the first mortgage from the homestead forty for the benefit of the Century Savings Bank and put all the burden of the first mortgage on the land on which Moody & Son held a mortgage prior and superior to the Century Savings Bank, and therefore held that the burden of the first mortgage should be distributed over both tracts in proportion to their value. This distribution strikes the common as well as the judicial mind as being fair. The contention now made by appellee is, that the land outside of the forty should first be exhausted by the Johnson mortgage, leaving the other forty clear to it. This is certainly not equitable. When they took a mortgage on that forty it was a second mortgage. The effect of the rule for which they now contend would make it a first mortgage. This would be marshaling assets so as to give the bank an advantage.

When Moody & Son took their mortgage on the 920 acres the Johnson mortgage was distributed not only over that acreage, but over an additional forty. That is to say, so much incumbrance on each acre. If the rule contended for by appellee is applied, the amount of the first mortgage per acre resting upon the 920 acres is increased from what it was at the time that Moody & Son took their mortgage. Such marshaling of assets is not equitable.

Therefore, in the absence of any effect that the homestead laws of Iowa have upon the marshaling of assets, the rule adopted by the District Court was the most generous one that could possibly be applied for the benefit of the Century Savings Bank. We will, therefore, proceed to answer the argument of appellee upon the effect of the Iowa statutes upon the general rule for marshaling assets.

Counsel for appellee first cite *Linscott v. Lamart et al.*, 46 Iowa 312. Counsel for appellee, after citing this case, say:

> "This Linscott case is 'on all fours' with the instant case and covers it as 'with a blanket'."

This is a rather happy phrase for expressing the effect of that decision. If it covers the question involved in this controversy, it must do it "as a blanket", so that you can neither see under it nor through it. A careful analysis of that case will, however, clearly show that the question here involved was not there even considered. One Joseph Ash, Sr., owned seventy-one acres of land on which he resided, thus making forty acres of it homestead under the Iowa statutes. In 1869 he made a mortgage on all of it, including the homestead, to one Lamart. Subsequently the plaintiff, Linscott, obtained a general judgment and sold one-half of it, or thirty-five and one-half acres, to satisfy the general execution. This, it will be noted, left thirty-five and one-half acres for the homestead of Ash, while the Iowa statute protects him in forty acres. Subsequently Ash conveyed all of this land to Lamart, but Lamart did not cancel his mortgage, but it was kept for the purpose of protecting him against the subsequent lien of Linscott. This land had been sold under another special execution in favor of Linscott based upon the foreclosure of a mortgage. This Lamart paid off, and one of the questions involved was as to whether or not it was a redemption as lien holder or a discharge as owner. The lower court held that it was a redemption as lien holder and entitled Lamart to a sheriff's deed. The plaintiff, Linscott, claimed that it was merely a discharge of the lien. Linscott further

claimed that as Lamart had taken the legal title to these premises he had canceled the mortgage and had left the land free and clear so as to be subject to the lien of his general execution.

Now upon that state of facts and contention, the Supreme Court of Iowa held that the fact that Lamart had taken legal title did not extinguish his rights under his mortgage, because it was not the intention of the parties to so do. Second, that as Linscott had sold a part of the homstead in his general execution, that sale was void and should be set aside. Third, the Court held that the action of Lamart in paying off the mortgage execution sale did not have the effect of a redemption of a lien holder, and therefore was not entitled to have title through and under such proceeding. The Court says:

> "The evidence does not show that Lamart redeemed from plaintiff's foreclosure sale as a lienholder or creditor of Ash. He paid his money in satisfaction of the judgment, and must be regarded as redeeming as owner of the land. This sum, however, is a material addition to the amount agreed to be paid by Lamart for the land. The decree of the District Court dismissing the plaintiff's action will be affirmed because of the unauthorized sale of part of the homestead. The decree quieting title in defendant will be so far modified as to permit plaintiff to take out execution, ascertain the land not embraced in the homestead and levy and sell it subject to defendant's mortgage."

If this case decides the question involved in the instant case, we are not able to see it. It indeed must be "under a blanket". It does not undertake to say what would be the relative effect of the Lamart mort-

gage on the remaining 31 acres, nor what would be the effect of plaintiff's general execution. It leaves that question wholly undetermined. It simply gave the right to plaintiff "to take out another execution, ascertain the land not embraced in the homestead, and levy and sell it subject to defendant's mortgage." It does not undertake to decide the question whether Lamart's mortgage shall all be placed on the 31 acres outside of the homestead, or whether it shall be distributed, the question that is really involved in the instant case.

Alley v. Bay et al., 9 Iowa 509, is cited by counsel for appellee as supporting their contention. That case simply decides that where a mortgage is executed upon land, a part of which is a homestead, it is of no validity as to the homestead unless signed by the wife. This decision is followed by a long line of decisions in Iowa, and that proposition is thoroughly settled, and we have at all times conceded it in the progress of this litigation. The Moody mortgage, in terms, covered the homestead, but not being signed by the wife, became absolutely void as to the homestead, which created the situation that has been involved in this litigation, but this case in no manner touches upon the question of marshaling of assets involved in this suit.

We have conceded all the way through this case all that is decided in this *Alley v. Bay* case. We have conceded that the Century Savings Bank, or any other person interested in the land, could raise the question of the validity of our mortgage upon the homestead. This is true by reason of the wording of our statute which says that it shall be "**absolutely void**". If it is void, of course no one could waive it, and anybody could avail themselves of it. If it were not for the express terms of our statute, Moody & Son might have come

in and said that nobody can avail themselves of the failure of the wife to sign except herself or her husband, but being absolutely void, of course any one can defend against it. We have never contended otherwise in this case, and do not contend otherwise now.

Counsel further cite the case of *Bolton v. Oberne et al.*, 79 Iowa 278. It decides the same question and on the same grounds. Here was a case where the wife had failed to sign the conveyance, part of which was a homestead. On page 281 the Court says:

> "This conclusion is not seriously questioned by appellee, but he insists that appellants are not in position to take advantage of the invalidity; that in justice and equity no one outside of the family or heirs can disturb the title or take advantage of the deed; that all of the heirs have treated the conveyance as valid and that no one else has a right to question it. The statute provides that such a conveyance is of **no validity**. *Code*, Sec. 1990; *Alley v. Bay*, 9 Iowa 509; *Barnett v. Mendenhall*, 42 Iowa 296; *Belden v. Younger*, 76 Iowa 507. Therefore any one interested in the property it attempted to convey may question it."

If Moody & Son had questioned the right of the Century Savings Bank to insist upon the invalidity of their mortgage on the homestead 40, then this decision would be in point, but we never have so insisted, and it therefore has no relevancy.

They next cite *Redfield v. Stocker*, 91 Iowa 383. That case does not decide anything more than we concede in the case at bar. The plaintiff had purchased a thresher from Payne. This thresher was levied upon by the plaintiff as the property of Payne. Under the laws of the State of Iowa this property was exempt

from execution. Payne had a perfect right to sell it, independent of any general debts. When plaintiff purchased it, he acquired good title as against any debtors of Payne, and of course he would have a right to allege and set up that fact even though Payne should remain silent. He certainly had a right to show the status of the property at the time he bought it. This decision does not hold anything more than we have at all times conceded. We have conceded that the Century Savings Bank had a right to set up the fact that the 40 acres was a homestead, and that as such, our mortgage did not constitute a valid lien on it, but this decision does not in any manner touch upon the question involved in this controversy. This is a controversy to determine how the property shall be marshaled in the payment of recognized and admitted liens. We admit that the Century Savings Bank has a lien on the 40 acres prior to ours, but we do not concede that by reason of that it has a right to insist that liens which were on the 40 acres and prior to its, shall be taken out from under its mortgage and placed under ours. That is the real question.

Counsel in the latter part of their argument on the seventh and on all of the eighth propositions clearly overlook legal distinctions. All the authorities agree that the homestead right is a personal one and can be made available only at the election of the homesteader himself. This does not in the least conflict with the authorities above cited and analyzed. There by express statute the instrument is not voidable, but absolutely void, and of course any one could avail himself of that defect. But in the absence of that statute it would be necessary for the homesteader to claim his homestead exemption in order to avail himself of it

or allow any one else to avail himself of it. Counsel seem to overlook the distinction that is apparent, that in one case the rights are created by statute, and in the other by general decisions. With this distinction kept clearly in mind, the inapplicability of this part of the argument must be apparent.

"ARGUMENT OF PROPOSITION NINE."

Under this heading counsel for appellee use some fifteen pages of their brief in attempting to establish a proposition that has no application to the question here under consideration. They undertake to show that the general rule for marshaling assets is sometimes modified, and is modified when it will work an injustice to the holder of the prior lien. Perhaps the fallacy or misconception of their application of the authorities can be illustrated by a single quotation from their brief under this heading.

In the quotation from *Story's Eq. Jur.*, the rule is laid down, "but although the rule is so general, yet it is not to be understood without some qualification. It is never applied except where it can be done without injustice to the creditor or other party in interest having title to the **double fund.**"

It will be noted that the rule is varied where it will work "injustice to the creditor having title to the **double fund**".

Now, in the case at bar, who is the party that has title to the double fund? It is Johnson. It is not Moody & Son, because they have title to only one fund, and they have a right under the rule for marshaling assets to have Johnson, who has a lien on the double fund, to first exhaust that on which they have no lien, namely, the homestead forty. But what all these au-

thorities cited by counsel mean is that Moody & Son could not insist upon that kind of a marshaling if it worked to the detriment of Johnson. The Century Savings Bank has no right to invoke this exception to the general rule, because its lien is co-extensive, though junior to the Johnson mortgage.

Again, in the next citation from *Pomeroy*, this distinction is clearly recognized: "These rules must be taken with the modification and exception that in their application the paramount incumbrancer shall not be delayed or inconvenienced in the collection of his debt."

It will be noted from this quotation that the exception is in favor of the paramount incumbrancer, and not an exception that is extended to the junior incumbrancer that is asking for marshaling of assets.

The case of *Evertson v. Booth* cited clearly recognizes the same doctrine. It recognizes the rights of the **prior** incumbrancer.

In the case of *In re Assignment Hodgson*, 81 Iowa 392, the same distinction is recognized. That simply holds that this general rule of marshaling assets will be applied "whenever it will not trench upon the rights or operate to the prejudice of the party entitled to the **double funds**".

An examination of every authority cited by appellee under this heading of their brief will show that the exception to the general rule for marshaling assets is made to apply only as to the rights of the prior lienholder who has a lien on both funds.

This strange confusion, or lack of legal discrimination, runs all through counsel's extended argument. They seem to think that in some way and in some manner they have fallen heir to the rights of the superior

lien holder. The decisions cited by counsel for appellee are clear-cut and announce the rule accurately, but counsel distort and twist them to make them applicable to their client's situation, when, in fact, they have no application.

Counsel for appellee complain because we do not agree with the conclusions reached by the Circuit Court of Appeals. On page 63 they say: "Appellant openly quarrels with the Circuit Court of Appeals in the construction by that court of the Wisconsin cases. The Circuit Court of Appeals regards even the Wisconsin cases as overthrowing Moody's contention." Now, we do not "quarrel" with the Circuit Court of Appeals, but we do disagree with it in the conclusions there reached, both upon this case and the construction and application of the Wisconsin cases. If we agreed with the Circuit Court of Appeals we would not ask the judgment of this Court. We certainly have the right to appeal and ask for the review by this Court without being charged with quarreling with the other court. We pointed out in our original argument the error into which the Circuit Court of Appeals fell in its application of the facts in the Wisconsin cases to the instant case. A careful reading of the answer of appellee will show that counsel for appellee in their answer do not even undertake to answer that part of appellant's argument. They do not even undertake to defend, explain or back up the position taken by the Circuit Court of Appeals. In fact, they rather try to evade it and place the rights of the Century Savings Bank upon other propositions of law. They dissent from the proposition that the rights of the bank are dependent entirely upon the effect of Section 2976 of the Code of 1897. On page 61 they say: "And again, be-

ginning near the bottom of page 15 of his argument, Moody says, 'There is no controversy between the attorneys for the appellant and appellee that the rule adopted by the District Court was the correct one in the absence of Section 2976 of the Code of Iowa of 1897.' This also is incorrect. While it is true we count largely upon the provisions of the Iowa statutes for affirmance of the judgment and decree of the Circuit Court of Appeals, nevertheless, aside from and without the Iowa statutes, we submit Moody is not entitled to the relief he asks."

It will be noticed that in the original opinion filed by the Circuit Court of Appeals, appearing on pages 12-13 and 14 of appellant's brief, that that court based its decision entirely upon the effect of section 2976 and used the interpretation given by the Supreme Court of Wisconsin on a similar statute as a justification for its decision, and bases its reversal of the District Court solely on that ground. In the decision the Court says:

> "If neither tract had been a homestead there would be precedent for the action of the Court (District), Green v. Ramage, 18 Ohio 428, but the homestead element cannot be disregarded. The debtor and his wife expressly waived their homestead right and consented to the use of the proceeds in paying debts. The effect of this depends upon the State statute which created the right and prescribed its incidents and with respect to which the parties are held to have contracted. Section 2976 of the Code of 1897 provides that the homestead may be sold 'for debts created by written contract, executed by the persons having power to convey, and expressly stipulating that it is liable therefor, but then only for a deficiency remain-

ing after exhausting all other property pledged by the same contract for the payment of the debt.' "

It will be noticed that counsel for appellee are not willing to bottom their case on the same proposition that the Circuit Court of Appeals did. They do not exactly "quarrel" with the Circuit Court of Appeals, but they evidently are not entirely satisfied to rest their case on the position taken by the Circuit Court of Appeals. On page 61 counsel say: "While it is true we count largely upon the provisions of the Iowa statutes for affirmance of the judgment and decree of the Circuit Court of Appeals, nevertheless, aside from and without the Iowa statutes, we submit Moody is not entitled to the relief he asks. Even at common law and under the equitable doctrine of marshaling securities, Moody must fail, because there are not two funds, in fact, upon which the bank can come for the payment of its mortgage."

Notwithstanding counsel take this position, they fail to cite a single authority that would entitle them to relief under the common law, and we assert, without fear of contradiction, that there is not a single court decision in the United States that would grant the relief given by the Circuit Court of Appeals in the absence of a statute similar to the one in Iowa.

It will again be noted that in the above quotation from their argument they adhere to the confusion to which we have already called attention. They say: "There are not two funds in fact upon which the **bank** can come for the payment of its mortgage." The application of this rule does not apply to the "**bank**", which only has one fund, but applies to the Johnson mortgage, which has the two funds. On the same page

they further say: "Again, as shown by the authorities hereinbefore recited, the creditor who has recourse to the two funds cannot be held to resort to one alone for the benefit of the co-creditor, unless that one to which he is compelled to resort will pay in full his claim." Here, again, it will be noted that the authorities referred to in this general statement applies to the one that has a lien on the double fund. To make it clearly applicable to the present case, Johnson could not be compelled to resort to the non-homestead property for the benefit of either the Bank or Moody & Son if the non-exempt property did not pay his claim. This rule, and the authorities cited by counsel, have no application whatever to the rights of the bank or Moody & Son, but pertain solely to the rights of the lien holder that has the **double fund,** who is Johnson.

On page 62 counsel again confuse legal distinctions. They say: "Moody's argument that the homestead **right** is personal, and cannot be sold or conveyed for full consideration, is controverted by daily transactions. It is a common thing for a man owning a homestead, against whom judgments have been rendered, to sell and dispose of his homestead. In every such case the grantee, relying with assurance upon the settled law of this State, and standing so settled for nearly sixty years, purchases the homestead and pays his grantor therefor."

It will here be noted that counsel confuse the distinction between homestead **property** and homestead **rights.** The owner of a homestead holds it free from general debts and judgment. In other words, these are not a lien upon the homestead, and, of course, the homesteader can sell it and the purchaser will take it in the exact condition that it was in the hands of the

vendor. But this is not selling a "homestead right". We defy counsel to produce a single authority showing that any man has a right to sell a homestead right. He can sell homestead property, but the right is a purely personal one to him that cannot be transmitted, nor transmuted. And here is the crux of this question. Counsel for appellee insist that because they took a mortgage on the homestead forty they thereby became entitled to all the rights, privileges and immunities of the homesteader. "That they stepped into the shoes of the homesteader." No court in Iowa, or elsewhere, has so held.

The right of Hartzell under Section 2976 of the Code of 1897 to have the land other than the homestead first sold in the discharge of the Johnson mortgage is a personal right and did not pass to the Century Savings Bank simply by their taking a mortgage upon it. Hartzells mortgaged to the bank their homestead property, but not their **homestead rights**. No head of a family can mortgage his homestead rights, although under the provisions of the statute he may mortgage property then affected by that right. If the contention of counsel for appellee is correct, that the bank became subrogated to all the homestead rights of Hartzell by the execution of the mortgage in controversy, then Hartzell would never have any more homestead rights; they would have all been transferred to the bank. This position is unsound. Notwithstanding this execution of the mortgage of Hartzell on the homestead property, Hartzell still had numerous rights preserved by the Iowa statute. He had the right to change his homestead. He had the right to change its boundaries. He had a right to sell it subject to the mortgage and apply the proceeds to the purchase of another home-

stead. He had a right to hold the money received from the sale of the homestead free from other debts, and we claim in this contention that he has a perfect right to waive the sale of other land before the forty should be sold. Here is the ultimate contention between appellants and appellee. It is the broad contention of appellee that it became vested absolutely with the homestead **rights**. That the bank took the place of Hartzell in all matters subsequently affecting the homestead. In other words, that it had a mortgage on his homestead **right**. It is the contention of appellants, however, that Hartzell only mortgaged his homestead property, and that all other homestead rights not inconsistent therewith were personal to himself and could be exercised by him; that he did not sell or mortgage to the bank his right to insist upon or waive the manner in which the property should be sold under the Johnson mortgage.

Counsel for appellee attempt to lay pathetic stress upon the fact that they do not, under the ruling of the District Court, receive full discharge of their mortgage. That is true. Neither will Moody & Son receive full pay for their mortgage if the rule adopted by the District Court is applied. In any event, both the Century Savings Bank and Moody & Son will be the losers by reason of the insufficiency of security, but this certainly can have no legitimate bearing upon the application of the equitable rules for marshaling assets long promulgated and sustained by the courts. We believe we have met candidly and fairly every ground advanced by appellee offered in support of the decision of the Court of Appeals. The Circuit Court of Appeals' ruling is not sustained by either logic or authority when these authorities are accurately an-

alyzed and fairly applied. We therefore respectfully submit that this Court ought to reverse the decision of the Court of Appeals and remand the case for further action in accordance with the decision of the District Court.

AS TO THE JURISDICTION OF THE SUPREME COURT.

The contention of counsel for appellee as to the jurisdiction of this Court in their present brief is rather inconsistent with the contention advanced by them in opposition to appellant's application for a writ of *certiorari* (No. 906 Equity). At page 1 of their brief in opposition to the granting of a writ of *certiorari*, they stated:

> "Respondent, Century Savings Bank, an Iowa corporation, respectfully resists the application of petitioners, Robert Moody & Son, for the issuance of the writ of *certiorari*, in above cause, on the following grounds:
>
> "First: This cause is appealable to this court from the United States Circuit Court of Appeals for the eighth (8th) Circuit. Petitioners above named, as appellants, have already taken such appeal and have served upon respondent above named, as appellee, a citation to appear in this court and defend such appeal. A true copy of said citation, and of the acknowledgment of service thereof, made on the 29th day of January, 1914, is as follows:" (Then follows citation with acknowledged service.)

We will, nevertheless, now consider the question of the jurisdiction of this court upon this appeal. Unquestionably it was within the appellate jurisdiction

of this court to grant a writ of *certiorari* to review the decree of the Circuit Court of Appeals.

AS AFFECTED BY THE TIME APPEAL WAS TAKEN.

The jurisdiction of this Court is not dependent upon an appeal having been taken within thirty days after the entry of the decree by the Circuit Court of Appeals, because this is not an appeal from a decree allowing or rejecting a claim under the provisions of Section 25a (3) of the Bankruptcy Act, to which section alone General Order No. 36 has reference.

True, the appellant here requested findings of fact, out of abundance of caution, predicated upon the theory that the Court of Appeals must have entertained jurisdiction as upon an appeal from an order allowing or rejecting a claim of $500 or over under the provisions of section 25a (3). The Court, however, in its last opinion stated that "this case is not of that character" (Rec., p. 36). It further stated, "The case has the substantial aspects of an independent controversy. There is a distinct alignment of parties, and pleadings **unconnected with the ordinary assertion for allowance of a demand against the estate**" (Rec., p. 38).

Under these circumstances the Court was entirely correct in holding that findings of fact were unnecessary.

Since the decree of the Court of Appeals was not based upon jurisdiction conferred by the provisions of section 25a (3), it necessarily follows that the time for prosecuting an appeal from that court is not limited to the time fixed by General Order XXXVI to thirty days, but appeal may be taken at any time within one year

as provided by Section 6 of the Court of Appeals Act of March 3, 1891 (26 Stat. at Large, *l. c.* 828).

AS TO WHETHER JURISDICTION OF COURT OF APPEALS IS FINAL.

Counsel for appellee say, however, that the case is one in which the decree of the Court of Appeals is made final because the controversy here is one between citizens of different states. This contention we regard as so palpably erroneous that we shall content ourselves with directing the Court's attention to the fact that the original proceeding in which this proceeding arose was not dependent entirely **or at all** upon the opposite parties thereto being citizens of different states, but was one brought under the Bankruptcy Act of which the Federal Court had exclusive jurisdiction (Sec. 256, paragraph 6th of the Judicial Code), irrespective of the citizenship of the parties. The jurisdiction would have been just the same if both the parties here concerned had been citizens of Iowa.

By Section 128 of the Judicial Code it is provided that the

> "judgments and decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different states * * *."

Section 241 provides:

> "In any case in which the judgment or decree of the Circuit Court of Appeals is not made final by the provisions of this title, there shall be of right an appeal or writ of error to the Supreme Court of

> the United States where the matter in controversy shall exceed one thousand dollars, besides costs."

So that the controversy here not being one in which the decree of the Circuit Court of Appeals is made final, and the controversy exceeding $1,000, there is of right an appeal to this Court under Section 241 of the Judicial Code.

WAS THE DECREE OF THE CIRCUIT COURT OF APPEALS A FINAL DECREE?

Before leaving the subject of the jurisdiction of this Court upon this appeal we desire to refer briefly to the question as to whether the decree of the Circuit Court of Appeals is a final decree.

It will be observed that the decree entered by the Circuit Court of Appeals provides (Rec., p. 40):

> "It is further ordered that this cause be, and the same is hereby, remanded to the said District Court with directions for further proceedings **in conformity with the opinion of this Court.**"

The opinion on the merits (Rec., p. 32) concludes in this way:

> "We think that in a case like the one at bar the provision of the Iowa statute that resort to the homestead shall be only for a deficiency **is mandatory** and is not affected by the act of the debtor and his wife after the mortgages are given."

This language is tantamount to stating, and the entire opinion is to the effect, that the Johnson (or first) mortgage should be paid entirely out of the non-homestead fund and that the Century (or third) mortgage was entitled to the whole of the homestead fund.

Thus holding in its opinion and decreeing further proceedings in conformity with such opinion, made the opinion a part of the decree and thus so finally settled the issues between the parties as to leave no discretion whatever in the District Court as to what action it might take upon the receipt of the mandate of the Court of Appeals. The force and effect of the decree was as if it actually directed the District Court to set aside its former decree and award to the Century Bank the entire fund realized from the sale of the homestead property (so-called) and award to Robert Moody & Son the sum remaining out of the fund realized from the non-homestead property after discharging the Johnson mortgage.

The effect of such a decree has several times been adjudicated by this Court. In one of the late cases upon the subject (Metropolitan Water Company v. Kaw Valley Drainage District, 223 U. S. 519, 523) this Honorable Court stated:

> "It is true that the mandate did not in terms make such an order, yet its direction that the Circuit Court 'should proceed in accordance with the opinion' operated to make the opinion a part of the mandate as completely as though it had been set out at length. Under such a mandate nothing was left for the Circuit Court to do except to dismiss the bill."

Chesapeake and Potomac Telephone Company v. Manning, 186 U. S. 238, was an appeal from a decree of the Court of Appeals of the District of Columbia reversing the decree of the Supreme Court of the District of Columbia, which reversal decree remanded the cause to the Supreme Court "for the entry of a de-

cree granting the injunction in conformity with the opinion of this Court".

After quoting from the opinion of the Court of Appeals referred to in its decree, this Court said:

> "It thus appears that the Court of Appeals made a complete disposition of the controversy; that all that was left for the Supreme Court was the ministerial duty of entering a final injunction in the language of the preliminary order, with the proviso that it should operate until such time in the future as the defendant should voluntarily withdraw from business in the district. Clearly this was a final decree. Commissioners, Etc., v. Lucas, Treasurer, 93 U. S. 108; Bostwick v. Brinkerhoff, 106 U. S. 3, and cases cited in the opinion; Mower v. Fletcher, 114 U. S. 127."

Mower v. Fletcher, 114 U. S. 127, was a writ of error to the Supreme Court of California to review a judgment of that Court which adjudged that the judgment of the District Court "be and the same is hereby reversed with costs, with direction to the Superior Court of Los Angeles County to enter judgment upon the findings for the plaintiff as prayed for in his complaint." Upon a motion to dismiss the writ this Court said:

> "That judgment is final for the purposes of a writ of error to this Court, which terminates the litigation between the parties on the merits of the case, so that, if there should be an affirmance here, the Court below would have nothing to do but to execute the judgment it had already rendered. Bostwick v. Brinkerhoff, 106 U. S. 3, and the numerous cases there cited. The judgments in these cases are of that character. The litigation is ended, and the rights of the parties on the merits have been fully determined. Nothing remains to

be done but to require the inferior Court to perform the ministerial act of entering the judgments in that court which have been ordered. This is but carrying the judgment of the Supreme Court which has been rendered into execution. Nothing is left to the judicial discretion of the Court below. The cases relied on in support of the motions to dismiss were all judgments or decrees of reversal, with leave for further proceedings in the inferior court. Such judgments are not final, because something yet remains to be done to complete the litigation."

The decree of the Circuit Court of Appeals being a final one entered in a case in which the jurisdiction of the District Court was not invoked on the ground of diversity of citizenship there is consequently a right of appeal from the decision of the Court of Appeals to this Court under the provisions of Section 241 of the Judicial Code.

AS TO THE JURISDICTION OF THE COURT OF APPEALS TO REVIEW THE DECREE OF THE DISTRICT COURT IN THIS CASE UPON AN APPEAL.

Counsel for appellee candidly admit, on page 19 of their brief, that the opinions of the Circuit Courts of Appeal in the different circuits "are not altogether harmonious or reconcilable" upon the question of the proper proceeding to confer jurisdiction to review decrees of District Courts in bankruptcy cases.

The precise question of jurisdiction involved here has not been determined by this Honorable Court and it is because of this fact that we filed a petition for a writ of *certiorari* and urged in our original brief and now respectfully urge that the action of this Honorable

Court in denying that petition may be reconsidered if such course is essential to a review here.

A careful review of the decisions of this Court cited by appellee as controversies arising in bankruptcy proceedings will demonstrate that in none of them was the contention between creditors as among themselves, but in all of them the dispute was between a creditor and the trustee in bankruptcy. As stated in our original brief, "controversies arising in bankruptcy proceedings are defined by Section 23 of the Bankruptcy Act to be those cases arising between trustees in bankruptcy as such and adverse claimants". Since the act itself so carefully points out what are "controversies arising in bankruptcy proceedings" it necessarily follows that any action which is not between trustees in bankruptcy as such and adverse claimants cannot be "controversies arising in bankruptcy proceedings" and must be "proceedings in bankruptcy".

All of the other decisions of this Court cited by appellee are those in which a claim was asserted by a creditor against the bankrupt estate and joined with it, as an incident, the assertion of a lien.

The case at bar is neither the assertion under section 23 of a title by a third person of a lien adverse to the trustee in bankruptcy, nor does it arise by reason of a claim against the estate together with the incidental assertion of a lien for such claim. As is stated by the Court of Appeals in its opinion on the motion to dismiss (Rec., p. 37):

> "It is important to note that appellant was not asserting its mortgage lien as an incident to the presentation for allowance of its claim against the general estate, as was the case in Coder v. Arts and *In re* Loving."

In the instant case the trustees themselves in their petition fully set out and admitted the validity of the mortgages of each of the parties and set up no right in the trustees to any portion of the fund to be realized from a sale of the property except such as might be in excess of the mortgage indebtedness. After it was ascertained that the amount realized from a sale of the property was not sufficient to discharge the indebtedness of the mortgages upon the property, the trustees dropped out and all further proceedings were between the creditors as to the priority of their liens.

The proceeding, therefore, not being such an action as is defined by section 23, as "controversies arising in bankruptcy proceedings" reviewable by Section 24a of the Bankruptcy Act, under the Court of Appeals Act of March 3, 1891, and not involving the allowance or rejection of a claim of $500 or over within the provisions of Section 25a (3) of the Bankruptcy Act and therefore not an order to be reviewed by appeal under that section, it follows that review could be had only under the provisions of section 24b by petition and notice, because Section 130 of the Judicial Code specifically provides that the appellate jurisdiction of the Courts of Appeals under the Bankruptcy Act shall be exercised "in the manner therein prescribed".

We respectfully submit that the Circuit Court of Appeals was without jurisdiction to review the decree of the District Court upon an appeal and that the appeal should have been dismissed, as prayed.

S. F. PROUTY,
GEORGE F. HAID,
NEWTON P. WILLIS,
Counsel for Appellants.

SUPREME COURT

OCTOBER

ROBERT MOODY & SON, A CO
POSED OF ROBERT
E. MOODY

CENTURY SAVINGS BANK, A CORPORATION
R. A. CRAWFORD, ADMINISTRATOR OF
ESTATE OF

APPEAL FROM THE
OF APPEALS, EIGHTH CIRCUIT.

S. R. Prouty, Des Moines, Iowa, Counsel
Mo., Nesbitt
Appellants.
Horatio P. Dell, Des Moines, Iowa, William G.
Des Moines, Iowa, (Constituting the Firm of
Harvison), Solicitors for Century Savings Bank,
Thomas F. Stevenson, Des Moines, Iowa, Solicitor
Crawford, Administrator, Appellee.

Brief and Argument of Century Savings Bank, Appellee

Due, legal and timely service hereof is hereby accepted
acknowledged, at Des Moines, Iowa, this ------- day of Apr
1915.

Solicitors for Appellants.

Solicitor for R. A. Crawford, A
ministrator, Appellee.

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gage, though purporting to cover the homestead, is, under the laws of the State of Iowa, concededly invalid and of no force and effect in so far as the homestead is concerned, because Hartzell's wife is not a party thereto, the statutes of this State, (Iowa), to which attention is hereinafter directed, expressly so providing. This Moody mortgage constituted the second lien upon the Nine Hundred Sixty (960) acre tract, saving and excepting the homestead embraced therein, and constituted the second lien upon the One Hundred Twenty (120) acre tract.

Century Savings Bank Mortgage: Thereafter, and on June 11, 1908, Hartzell and his wife, both uniting therein, executed the Century Savings Bank mortgage upon both tracts, or the whole One Thousand and Eighty (1080) acres, which mortgage was at once recorded. This mortgage constituted the second lien upon the homestead, junior only to the Johnson or first mortgage, and the third lien upon all the remainder of the land, the Johnson and Valley Savings Bank mortgages being respectively the first liens thereon, the former on the Nine Hundred Sixty (960) acre tract, and the latter on the One Hundred Twenty (120) acre tract, and the Moody mortgage being the second lien upon the whole One Thousand and Eighty (1080) acres, saving and excepting the homestead only.

Waiver of Homestead: On October 14th, 1908, some ten or eleven weeks after the adjudication, Hartzell and his wife, both uniting therein, voluntarily executed what is termed a waiver of homestead, as shown in the printed transcript of record, at pages 1 and 2. This waiver, we submit, in no wise affects the case, for two (2) reasons:

First: They having executed a valid mortgage on the homestead to the Century Savings Bank, they could do or perform no act, with respect thereto, to the prejudice of the security afforded said Bank thereby, without the assent of the Bank thereto.

Second: The waiver itself recites that it foregoes or waives "all homestead right, title, claim and interest *we have* in said above described real estate, or *had at the time of the institution of proceedings in bankruptcy.*" (Trans. page 2, lines 12-14.) At the times mentioned in the waiver, their homestead right was subject to the mortgage to the Century Savings Bank, and such was all they could or did waive and surrender.

Petition of Trustees to sell land: On November 28, 1910, the Trustees in Bankruptcy filed their petition, praying authority to sell all the real estate, including the homestead, free and clear of liens. (Trans. pages 3 to 7.)

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Answer and Intervening or Cross petition of Century Savings Bank to said Petition: On January 6, 1911, the Century Savings Bank filed its answer and intervening or cross petition to said petition. (Trans. pages 7 to 11.) At paragraph 5 thereof, (Trans. page 8), the invalidity of the Moody mortgage, in so far as it purported to cover the homestead, was set up. At paragraph 12 of said answer, the interest of the Trustees in the estate of the bankrupt is alleged to be subject to the Century Savings Bank mortgage. (Trans. page 10.) And in paragraph 13 of the answer, assent to the order prayed by the trustees is given, provided the rights of the Bank, under its mortgage, be transferred from the land and impressed upon the proceeds of the sale of the homestead, "with the same force and effect as the same now exists upon and against the homestead."

Order for sale of land: On July 5, 1911, the said petition of the Trustees was granted, (Trans. page 12), and the order granting same specially provided that all liens on the real estate were removed from the land "and are hereby transferred to the funds derived from the sale of said premises." (Trans. page 13.)

Sale of One Thousand and Eighty (1080) acres: Thereafter, the Nine Hundred Sixty (960) acre tract, including the homestead, was sold to Meade for $64,253.00, of which sum, the homestead brought $8,000.00, and the One Hundred Twenty (120) acre tract was sold to Laughlin for the sum of $6,000.00 (See findings of Fact and Conclusions of Law, paragraphs 10 and 12. Transcript pages 17 to 21.) We have no further concern in this case with the proceeds of the Laughlin tract.

Order for Distribution of Funds: On proper subsequent proceedings and hearing for final distribution of the funds thus arising, all claims and liens against the land, excepting the Moody mortgage and the Century Savings Bank mortgage, after payment of costs of administration, taxes, mechanic's lien, etc., were paid in full, leaving in the hands of the Trustees, the sum of $13,683.94, (Trans. page 18, paragraph 11).

In other words, and stating the said distribution more in detail, the proceeds of the sale of the Nine Hundred Sixty (960) acre tract, including the homestead Forty (40) acres, were the sum of $64,253.00. (Trans. page 20.) After paying taxes, the mechanic's lien, cost of administration, etc., there was left in the hands of the Trustees, a remainder of $54,264.77, only. This remainder included $8,000.00 arising from the sale of the homestead. Said remainder was by the decree of the District Court distributed as follows:

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Part of homestead proceeds on Johnson mortgage,	$ 5052.63
Part of non-homestead proceeds on Johnson mortgage,	35528.20
Total paid on Johnson mortgage (Trans. p. 20)	$40580.83
Remainder of homestead proceeds on bank's mortgage	$ 2947.27
Remainder of non-homestead proceeds on Moody mortgage	10736.67
Grand Total (Trans. pages 20 and 21)	$54264.77

Distribution of proceeds of sale of Nine Hundred Sixty (960) acres contended for by the bank. The bank contends that no part of the proceeds of the homestead should have been applied upon the Johnson mortgage. The whole of the homestead proceeds, to wit: $8,000.00, should have been paid to the bank, and that the distribution should have been as follows:

Part of non-homestead proceeds on Johnson mortgage,	$40580.83
All of homestead proceeds on bank's mortgage,	8000.00
Remainder of non-homestead proceeds on Moody mortgage	5683.94
Total, as above,	$54264.77

Findings of Fact and Conclusions of Law: On May 24, 1912, the honorable District court filed and entered of record its said "Findings of Fact and Conclusions of Law", whereby it was determined that out of said remainder of $13,683.94, the bank was not entitled to receive the $8,000.00 arising from the sale of the homestead, but was entitled to receive therefrom the sum of $2,947.27, only, and that the net remainder of $10,736.67, which included $5,052.63 of the proceeds of the homestead, should be paid to Moody.

In this connection, we set out Paragraph 7 (unnumbered), and Paragraph 10 of Division B of said Conclusions of Law, for which see Transcript, page 20, the same being as follows:

> "The court concludes and holds that the $8,000.00 received from and on account of the sale of the homestead, should proportionately be used to pay off the Johnson mortgage; proportionately to the entire sum received from the sale of 960 acres. So that the court holds that $5,052.63 of the proceeds of the sale of the homestead should be applied on the Johnson mortgage, and the balance from the sale of the other 920 acres, viz: $35,528.20. The con-

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clusion is that $5,052.63 of the homestead money should be applied on the Johnson mortgage. This leaves $2,947.27 to be otherwise applied."

"10. The Century Savings Bank mortgage, signed by both Hartzell and wife, was and is prior to the Moody mortgage as to the homestead forty acres, and the money realized therefrom. And as a conclusion of law, the holding is that the Century Savings Bank will be paid $2,947.27."

Exceptions to Conclusions of Law: On May 15, 1912, the bank duly filed Exceptions to said "Conclusions of Law." (Trans. pages 13-15), especially excepting to the application of any part of the proceeds of the homestead upon the Johnson first mortgage, to the refusal of the Court to apply all of the proceeds of said homestead, in the sum of $8,000.00, upon the Century Savings Bank mortgage, and to the payment to Moody & Son, of the sum of $5,052.63 (part of $10,736.67) which Moody & Son would not have received if all of the proceeds of the homestead had been applied on said Bank mortgage.

Decree: On May 24, 1912, the court overruled said exceptions, and entered decree conformably to said Findings of Fact and Conclusions of Law, to all of which the bank at the time, in open court duly excepted, (Trans. pages 21-22), and gave notice of appeal to the Circuit Court of Appeals. 8th Circuit.

Petition for Allowance of Appeal: And on May 25, 1912, the bank filed in the District Court its petition, in due form, for the allowance of appeal, together with "Assignment of Errors" and "Bond on Appeal", which petition was granted on same day, the appeal was allowed, bond approved, and Citation issued. (Trans. pages 22 to 25.)

Citation served: Said citation was duly served on Robt. Moody & Son, on May 29, 1912, and on appellee, R. A. Crawford, Admr., June 1, 1912, and said citation, with return of such service thereof endorsed thereon was duly filed in the office of the clerk of said District Court. (Trans. pages 1 and 27-28.)

Praecipe for Transcript: Praecipe for Transcript in due form was duly filed in the office of said clerk, May 31, 1912. (Trans. page 26.)

NOTE 2. It is already obvious that the real controversy is as to the distribution of said sum or remainder of $13,683.94, as between Moody and the Century Savings Bank. While the decree of the District Court applied $5,052.63, arising out of the proceeds of the sale of the homestead, to the payment *pro tanto* of the Johnson mortgage, nevertheless, the reversal of that decree

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by the Circuit Court of Appeals with instructions to the Trustees to turn over to the Century Savings Bank the whole of the proceeds of the sale of the homestead, to wit: $8,000.00, out of the sum of $13,683.94 in their hands, and to turn over the then net remainder, to wit: $5,683.94, to Moody, effectuated justice and equity without in anywise disturbing or prejudicing R. A. Crawford, Administrator.

PROCEEDINGS IN THE CIRCUIT COURT OF APPEALS.

Additional Facts: This case was submitted to the honorable Circuit Court of Appeals, December 17, 1912. On April 15, 1913, that Court handed down its opinion and entered its decree, reversing the judgment of the District Court and remanding the cause for further proceedings.

For these proceedings, including said opinion of April, 15, 1913, see Transcript pages 29 to 32, and 204 Fed. page 963.

Motion to Vacate: On May 14, 1913, Moody & Son filed motion to vacate the decree, and request for findings of fact and conclusions of law, by the Circuit Court of Appeals, to the end that they might have foundation for an appeal to the United States Supreme Court. Said motion to vacate being as follows:

> "Now on this day come Robert Moody and Son, Appellees in the above entitled cause, and respectfully move the Court to set aside the decree entered herein on April 15, 1913, and make a finding of facts in this cause and of its conclusions of law thereon, stated separately, in accordance with the General Orders in Bankruptcy, No. XXXVI, adopted by the Supreme Court of the United States, to the end that said Appellees may take an appeal herein to the Supreme Court of the United States, under Section 25 of the bankruptcy Act of 1898, and under said Order No. XXXVI.
>
> Appellees further state that the appeal was considered (by the Court of Appeals) upon the findings of facts prepared by the District Court and they therefore submit a copy of those findings for the consideration of the court as the findings of this Court."

The Circuit Court of Appeals, on said day, made the following order, conditionally sustaining said motion, to wit:

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"This cause came on to be heard upon the motion of counsel for Appellees, Robt. Moody and Son, for an order to vacate and set aside the decree of this Court and for a finding of facts and conclusions of law.

On consideration whereof, it is now here ordered that said motion be granted, unless good cause to the contrary shall be shown by counsel for Appellant within ten days from and after this date, May 14, 1913." (Trans. pg. 32.)

Within the time allowed by the foregoing order, the Century Savings Bank, filed in the Circuit Court of Appeals its showing in opposition to said motion, said showing being in the following terms, to wit:

"Comes now the Century Savings Bank, appellant above named, and objects to and opposes the motion of Robt. Moody and Son, appellees above named, and respectfully shows to this Honorable Court that said motion is based upon Rule 36 of General Orders in Bankruptcy. Section 3 of said rule 36 provides as follows:

'3. In every case in which either party is entitled by the act to take an appeal to the Supreme Court of the United States, the court from which the appeal lies shall *at or before the time of entering its judgment or decree,* make and file a finding of the facts, and its conclusions of law thereon, stated separately; and the record transmitted to the Supreme Court of the United States on such an appeal shall consist only of the pleadings, the judgment or decree, the findings of facts, and the conclusions of law.'

The grounds of appellant's objections and opposition to said motion of said appellees are:

1. Inasmuch as the decree complained of by the said appellees was filed and entered in this Court on April 15, 1913, and no findings of facts and conclusions of law thereon was then or previously requested of this honorable Court, the right to request same has been waived and lost by said Robt. Moody and Son, Appellees, and cannot be resurrected or recreated at a date subsequent thereto.

2. This honorable Court is without jurisdiction or power to vacate the decree complained of, on the motion of said appellees, for the sole purpose of affording them a basis for an appeal, in the absence of a request for a find-

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ing of facts and conclusions of law thereon, made by them prior to, or at the time of the entering of the decree complained of by appellees.

3. This honorable Court is without jurisdiction or power to make an order sustaining said motion of said appellees, because more than thirty days have intervened since April 15, 1913, the date on which the decree complained of was entered. (Rule 36, Section 2.)

4. This honorable Court is without jurisdiction or power to now make and enter Findings of Fact and Conclusions of Law.

5. The granting of said motion would be, in practical effect, an abrogation or repeal of said Rule 36, which rule was prescribed or enacted by the Supreme Court of the United States, to be observed generally in all cases, and the substitution therefor, by this honorable Court, of a different and contradictory rule, to obtain specially in the instant case, the patent effect of which, and the sole ground of requesting which, is to relieve said appellees Moody and Son from the results of their failure to request Findings of Fact and Conclusions of Law, "at or before the time" this honorable Court entered its judgment or decree herein. All of which is respectfully submitted." (Trans. pages 32-33.)

Order vacating decree: On June 12, 1913, the Circuit Court of Appeals entered an order vacating said former decree of that Court, and continuing the case under further advisement. (Trans. pages 33-34.)

Motion to dismiss: On June 13, 1913, Moody & Son, filed their motion to dismiss the appeal taken by the Century Savings Bank, from the District Court to the Court of Appeals, on the ground that the Court of Appeals was without jurisdiction, said motion being as follows:

"Now come the appellees, Robert Moody and Son, and respectfully state that this court is without jurisdiction upon appeal in the cause for the following reasons:

1. It appears from the record in this cause that this was a proceeding in bankruptcy in which this court is given jurisdiction to superintend and revise in matter of law only under the provisions of Section 24b of the Bankruptcy Act.

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2. It appears from the record that this cause does not involve "controversies arising in bankruptcy proceedings" under section 24a of the Bankruptcy Act, nor is it an appeal from a judgment allowing or rejecting a debt or claim of five hundred dollars or over under Section 25a (3) of the Bankruptcy Act.

Wherefore said appellees pray the court to vacate and set aside the decree of reversal heretofore entered herein by this court and to now enter a decree dismissing the appeal herein for want of jurisdiction." (Trans. pg. 34.)

We are charitable enough to believe that this motion must be an after-thought. The original opinion and decree of the Court of Appeals was vacated, at Moody & Son's request, in order to furnish them a foundation for an appeal to the Supreme Court of the United States. Instead of prosecuting such appeal to said Supreme Court, they filed said motion to dismiss our appeal.

Supplemental Opinion December 11, 1913. Said motion to dismiss the bank's appeal from the District Court to the Circuit Court of Appeals was fully argued in print on both sides and submitted. On December 11, 1913, the Court of Appeals handed down its supplemental opinion, specially concurred in by his Honor, WALTER I. SMITH, *Circuit Judge*, denying said motion to dismiss, denying the request of Moody & Son for findings of fact and conclusions of law, vacating the order of June 12, 1913, setting aside the original opinion and decree of April 15, 1913, and reentering said original decree of April 15, 1913. (See Trans. pages 35 to 40 and 209 Fed. 775.)

Moody & Son's Petition for Appeal. Thereupon, and on January, 27, 1914, Moody & Son filed in said Court of Appeals their petition for appeal to the Supreme Court of the United States, together with their assignments of error, bond on appeal, and praecipe for transcript. On same day, their appeal was duly allowed, their bond approved and citation issued. (Trans. pages 40 to 43.)

Citation was served on the bank on January 29, 1914, and was filed in the Circuit Court of Appeals on January 30, 1914.

PROCEEDINGS IN SUPREME COURT OF THE UNITED STATES.

The Transcript was filed in this Court February, 16, 1914. Moody & Son's argument was served on the bank on March 2, 1915, and filed in this Court on or about March, 6, 1915.

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Certiorari. Moody & Son also filed petition for writ of certiorari in this Court on or about the 24th day of February, 1914. Same was docketed as case #906. Resistance thereto was filed by the bank on or about the 20th day of February, 1914. The writ was denied by this Court March 2, 1914. See *Moody & Son vs. Century Savings Bank,* 232 U. S. 725-727. (58 Law Ed. 816.)

Propositions Relied Upon for Affirmance.

Division I. Jurisdiction of Supreme Court.

Proposition 1. *If this case is a "proceeding in bankruptcy" proper, as contended by Moody & Son, and not a "controversy arising in bankruptcy proceedings" or a "controversy arising in the settlement of the estate of a bankrupt," as contended by the bank, then the appeal of Moody & Son from the Circuit Court of Appeals to this, the Supreme Court, is governed by Order 36 of the "General Orders in Bankruptcy" and must be taken or allowed within 30 days from the date of judgment appealed from. It was not taken within said 30 days. Moody & Son have therefore lost their right of appeal. This Court is therefore without jurisdiction to entertain their appeal and it should be dismissed, and the judgment below affirmed.*

Proposition 2. *If this case is a "proceeding in bankruptcy," as contended by Moody & Son, then the judgment or decree of the Circuit Court of Appeals, on the merits, is final, the jurisdiction of the Federal Court being "dependent entirely" upon the parties to this suit being citizens of different States. (Sec. 128, Judiciary Act of March 3, 1911.)*

Division 2. Jurisdiction of Circuit Court of Appeals, (and of Supreme Court.)

Proposition 3: *The bank's right of appeal to the Circuit Court of Appeals from the order of the District Court in this case, is allowed under the Court of Appeals Act of March 3, 1891.*

In re Loving, 224 U. S. 183; 56 Law Ed. 725 (*Mr. Justice Day*)

Knapp vs. Milwaukee Trust Co., 216 U. S. 545; 54 Law Ed. 610. (*Mr. Justice Day*)

Coder vs. Arts, 213 U. S. 223; 53 Law Ed. 772. (*Mr. Justice Day*)

First Nat. Bank vs. Chicago Title & Trust Co., 198 U. S.

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280; 49 Law Ed. 1051. (*Mr. Chief Justice Fuller*)
Files vs. Brown, 124 Fed. 133. (Eighth Circuit)
In re Friend, 134 Fed. 778. (Seventh Circuit)
In re Martin, 201 Fed. 31. (Sixth Circuit)
Rhode & Horn vs. Phipps, 195 Fed. 114. (Sixth Circuit)
In re Mueller, 135 Fed. 711. (Sixth Circuit)
Brady vs. Barnard, 170 Fed. 576. (Sixth Circuit)
Morehouse vs. Hardware Co., 177 Fed. 337. (Ninth Circuit)

PROPOSITION 4: *Such right of appeal is also allowed by Section 24-a of the Bankrupt Act of 1898.*
Hobbs vs. Head & Dowst Co., 231 U. S. 692; 58 L. Ed. 440 (*Mr. Justice Holmes*)
Lazarus vs. Prentice, 234 U. S. 263; 58 L. Ed. 1305 (*Mr. Justice Day*)
Greey v. Dockendorff, 231 U. S. 513, 58 Law Ed. 339 (*Mr. Justice Holmes*)
Houghton vs. Burden, 228 U. S. 161, 57 L. Ed. 780 (*Mr. Justice Lurton*)
In re Loving, 224 U. S. 183; 56 Law Ed. 725. (*Mr. Justice Day*)
Teft vs. Munsuri, 222 U. S. 114; 56 Law Ed. 118. (*Mr. Chief Justice White*)
Knapp vs. Milwaukee Trust Co., 216 U. S. 545; 54 Law Ed. 610. (*Mr. Justice Day*)
Coder vs. Arts, 213 U. S. 223; 53 Law Ed. 772. (*Mr. Justice Day*)
First Nat. Bank vs. Chicago Title & Trust Co., 198 U. S. 280; 49 Law Ed. 1051. (*Mr. Chief Justice Fuller*)
Hewitt vs. Berlin Mch. Works, 194 U. S. 296; 48 Law Ed. 986. (*Mr. Chief Justice Fuller*)
Electric Co. vs. Patterson, 211 Fed. 244. (Eighth Circuit)
Bank vs. Varner, 216 Fed. 721. (Eighth Circuit)
Stern vs. Merchants Nat. Bank, 216 Fed. 862. (Eighth Circuit)
Thomas vs. Woods, 173 Fed. 585. (Eighth Circuit)
Files vs. Brown, 124 Fed. 133. (Eighth Circuit)
In re Friend, 134 Fed. 778. (Seventh Circuit)
Rhode & Horn vs. Phipps, 195 Fed. 114. (Sixth Circuit)

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Barnes vs. Pampel, 192 Fed. 525. (Sixth Circuit)
Brady vs. Barnard, 170 Fed. 576. (Sixth Circuit)
In re Mueller, 135 Fed. 711. (Sixth Circuit)
Kirkpatrick vs. Harnesberger, 199 Fed. 886. (Fifth Circuit)
Thompson vs. Mauzy, 174 Fed. 611. (Fourth Circuit)
In re Jungmann, 186 Fed. 302. (Second Circuit)
Morehouse vs. Hardware Co., 177 Fed. 337. (Ninth Circuit)

PROPOSITION 5: *Such right of appeal is also allowed by Section 25-a (3) of the Bankrupt Act of 1898.*

In re Loving, 224 U. S. 183; 56 Law Ed. 725. (*Mr. Justice Day*)
Teft vs. Munsuri, 222 U. S. 114; 56 Law Ed. 118. (*Mr. Chief Justice White*)
Coder vs. Arts, 213 U. S. 223; 53 Law Ed. 772. (*Mr. Justice Day*)

PROPOSITION 6: *The action before the Court is not a "proceeding in Bankruptcy" proper. It is a "controversy arising in Bankruptcy proceedings" or a "controversy arising in the settlement of the estate of a Bankrupt." The right of appeal therein is allowed as in the last three propositions above stated.*

Houghton vs. Burden, 228 U. S. 161, (57 L. Ed. 780) (*Mr. Justice Lurton*)
Teft vs. Munsuri, 222 U. S. 114; 56 Law Ed. 118. (Mr. *Chief Justice White*)
Hewit vs. Berlin Mch. Works, 194 U. S. 296; 48 Law Ed. 986. (*Mr. Chief Justice Fuller*)
Files vs. Brown, 124 Fed. 133. (Eighth Circuit)
In re Friend, 134 Fed. 778. (Seventh Circuit)

DIVISION 3. THE MERITS.

PROPOSITION 7. *The "Waiver of Homestead" by the bankrupt and his wife, was without effect as against the bank and its rights under its mortgage.*

Point I. The homestead ordinarily is exempt from judicial sale, and in this case consists of 40 acres.

Code of Iowa of 1897, Sec. 2972;
Code of Iowa of 1897, Sec. 2978;
In re Bailey, 176 Fed. Rep. 990.

Point II. The homestead being so exempt, did not pass to the Trustees, by virtue of the adjudication of bankruptcy.

Bankruptcy Act, Sec. 6;
In re Bailey, 176 Fed. Rep. 990;
Hull vs. Dicks, 235 U. S. 584, (59 L. Ed. --).

Point III. The Moody mortgage does not cover the homestead because it was not signed by the bankrupt's wife, and the trial Court so adjudged.

Code of Iowa of 1879, Sec. 2974.

Point IV. The homestead was liable to sale in payment of the Johnson or first mortgage, but only after exhausting the remaining 920 acres covered thereby. The 920 acres of non-homestead land having sold for more than enough to pay the Johnson mortgage, the excess of proceeds of the 920 acres was properly applied upon the Moody or second mortgage. This left the homestead 40 acres subject to sale under the bank's mortgage only.

Code of Iowa of 1897, Sec. 2976;
Code of Iowa of 1897, Sec. 4032;
Taylor vs. Trulock, 59 Iowa, 558.

Point V. By executing the bank's mortgage, the bankrupt and his wife, for valuable consideration, conveyed to, or waived their homestead right in favor of the bank. The bank, in legal effect, became a purchaser, for value, of the homestead, subject to the bankrupt's right to redemption only. The bankrupt had no power to subsequently again convey or waive the homestead to the bank's prejudice.

In re Estate of Gill, 79 Iowa, 296;
Central Trust Co. vs. Stepanek, 138 Iowa, 131;
Boggs vs. Douglas, 105 Iowa, 344;
Code of Iowa of 1897, Sec. 2981;
Linscott vs. Lamart, 46 Ia. 312.

Point VI. The bank has the same rights under its mortgage upon the homestead, and as against Moody, that it has, as against Johnson and against the bankrupt, because Moody has no right in the homestead, either as a secured or as a general creditor. Under its mortgage, the bank steps into the shoes of, or is subrogated to the exemption rights of, the bankrupt.

Alley vs. Bay, 9 Iowa, 509;
Bolton vs. Oberne, Hosick & Co., 79 Iowa, 278;
Redfield vs. Stocker, 91 Iowa, 383;

Waugh vs. Bridgeford, 69 Iowa, 336;
In re Bailey, 176 Fed. Rep. 990;
Linscott vs. Lamart, 46 Ia. 312.

PROPOSITION 8. *The "Waiver of Homestead" by its very language or terms, and in the light of the then existing facts and circumstances, is without prejudice to the bank's rights.*

PROPOSITION 9. *The doctrine of marshalling assets, or marshalling securities, does not apply in this case, because in fact the bank had only one fund to which it could look, to wit: the proceeds of the homestead; and also because thereby the rights and equities of the bank are manifestly greatly prejudiced and impaired.*

Point I. Equity regards the substance, not the form. In fact, the bank had a lien on one fund only, the proceeds of the homestead. 11th Am. and Eng. Enc. of Law, (2nd Ed.) Title, Equity, page 184.

Point II. Marshalling of assets can only be applied where the creditor, against whom the rule is invoked, has two or more funds to look to, and whose rights will not be prejudiced by the application of the rule.

Text Authorities:

Story's Eq. Jur. (12 Ed.) Sec's. 560 and 642; Pomeroy's Eq. Jur. Vol. 4, (1905 Ed.) Sec. 1414.

Iowa Authorities:

In re Assignment of Hobson, 81 Ia. 392, (398);
Cutler v. Ammon, 65 Ia. 281, (284);
Wolfe v. Smith, 36 Ia. 454, (456);
Clark v. Bancroft, 13 Ia. 320, (326);
Dickson v. Chorn, 6 Ia. 19, (32);
Tollerton v. Anderson, 108 Ia. 217;
Wallin v. Murphy, 117 Ia. 640.

Other Authorities:

In re Bailey, 176 Fed. Rep. 990, (D. C. Utah);
McArthur v. Martin, 23 Minn. 74;
Marr v. Lewis, 31 Ark. 203, (25 Am. 553);
Dorr v. Shaw, 4 Johns Ch. 17, (20);
Evertson v. Booth, 19 Johns, 485, (492);
Woolcocks v. Hart, 1 Paige's Ch. 185;
Stevens v. Church, 41 Conn. 369, (370);
Shedd v. Bank of Brattleboro, 32 Vt. 709, (717);
Walker v. Covar, 2 So. Car. 16, (19);
Denham v. Williams, 39 Ga. 312, (319);

Galloway v. The Bank, 54 Ga. 572;
Briggs v. The Bank, 1 Freeman, (Miss.) 574, (584);
Emmons v. Bradley, 56 Me. 333, (338);
Herriman v. Skilliman, 33 Barb. 378, (384);
Sweet v. Redhead, 76 Ill. 374, (377).

Division 1. Jurisdiction of Supreme Court.

Argument of Proposition One.

Jurisdiction of this Court: At the threshold of this argument, and by our Proposition 1, hereinbefore stated, we challenge the jurisdiction of this honorable Court to entertain the appeal of Moody & Son.

Contention of Moody & Son: As we understand their contention on the question of jurisdiction of the Circuit Court of Appeals to entertain our appeal from the District Court, it is that the matter presented and tried in the District Court is a "proceeding in bankruptcy" proper, and that it is not a "controversy arising in bankruptcy proceedings," or a "controversy arising in the settlement of the estate of a bankrupt." Assuming, but not confessing, for the moment that this contention of Moody & Son is well founded, then it is clear that their right to appeal to this Court from the order and decree of the Circuit Court of Appeals, is governed by Order 36 of "General Orders in Bankruptcy," promulgated by this honorable Court at its October term, 1898.

Order 36. Turning to said Order 36, we find that an appeal to this Court from the Circuit Court of Appeals "shall be taken within thirty days after the judgment or decree." (Sec. 2.)

And we further find that in such case the Circuit Court of Appeals "shall, at or before the time of entering its judgment or decree, make and file a finding of the facts and its conclusions of law thereon."

We submit that this honorable Court is without jurisdiction to entertain the appeal of Moody & Son in this case, and that said appeal should therefore be dismissed, and the decree below affirmed, for the following reasons:

First: The same was not taken within the thirty (30) days allowed by Order 36, section 2; and

Second: The Circuit Court of Appeals not only failed, but expressly refused to make findings of fact and conclusions of law, as required in said order, section 3.

We present these two grounds in the order stated.

First: The Facts: The supplemental and final decree of the Circuit Court of Appeals, and its order overruling the motion of Moody & Son to dismiss our appeal to the Circuit Court of Appeals for want of jurisdiction, and denying their request for findings of fact and conclusions of law, were made on December 11, 1913. (Transcript, page 39.) The appeal of Moody & Son was allowed January 27, 1914. (Transcript, page 41). The thirty day period allowed for the taking of the appeal expired January 10th (or 11th), 1914. The appeal not having been requested or allowed until January 27, 1914, we submit it is clear that the right of appeal was lost to and by Moody & Son because not exercised within the thirty days provided by said Order 36.

Second: The facts: The original opinion of the Circuit Court of Appeals was rendered April 15, 1913. (Transcript page 32). It contained no finding of facts or conclusions of law. On May 14, 1913, Moody & Son filed motion to set aside said decree and in said motion, and for the first time, asked for finding of facts and conclusions of law. (Transcript page 32). On May 19, 1913, the bank filed its resistance to said motion on the grounds shown in such resistance. (Transcript pages 32 and 33). Said motion of Moody & Son was sustained and the original decree vacated. In the supplemental decree of December 11, 1913, the Circuit Court of Appeals set aside its order vacating its original decree of April 15, 1913, overruled said motion of Moody & Son to dismiss, denied their request for finding of facts and conclusions of law, and re-entered its original opinion and decree of April 15, 1913.

We submit the action of the Circuit Court of Appeals in denying the request of Moody & Son for finding of facts and conclusions of law, was correct. From this action no appeal was prosecuted by Moody & Son within the thirty days allowed by said Order 36.

We submit the mere statement of these facts, without further argument, is sufficient ground for our contention that this honorable Court is without jurisdiction to entertain this appeal on the part of Moody & Son. We therefore submit that their appeal should be, and request that the same be, dismissed, and the decree of the Circuit Court of Appeals affirmed.

Argument of Proposition Two.

As set out in this proposition, we submit that the judgment and decree of the Circuit Court of Appeals *on the merits* in this action is final, if the contention of Moody & Son is correct.

It will be remembered that their contention is that this cause is

a "proceeding in bankruptcy" and not a "controversy arising in a bankruptcy proceeding." Again assuming, but not confessing, for the moment, that their contention is correct, then the judgment and decree of the Court of Appeals is final *as to the merits.*

Section 128 of the Judiciary Act of March 3, 1911, in so far as applicable to this case, on the subject of appeals to this Court provides as follows:

> "The Circuit Court of Appeal shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the District Courts, * * * in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in section two hundred and thirty-eight, unless otherwise provided by law; and, except as provided in sections two hundred and thirty-nine and two hundred and forty, the judgments and decrees of the Circuit Courts of Appeal *shall be final* in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being * * * *citizens of different States.*"

It will be observed that this section makes the judgment and decree of the Circuit Court of Appeals final "in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being citizens of different States."

Diverse Citizenship: The parties to this action, as already pointed out, are Moody & Son and the Century Savings Bank. The former, the partnership, and the two individuals composing the partnership, are residents and citizens of the State of Texas, as found by the learned District Court in its order granting authority to sell the real estate of the bankrupt. (Trans. top of page 13). The latter, the Century Savings Bank, is a corporation organized under the laws of Iowa and is a citizen and resident of that State. (Trans. page 4).

If we leave out of the case entirely the thought that this action grows out of the bankruptcy of Hartzell, we have Moody & Son, a citizen and resident of Texas, prosecuting this action in the Federal Court against the Century Savings Bank, a citizen and resident of Iowa. Because of this diverse citizenship and the amount involved, the Federal Court acquired jurisdiction of this action. But for this diverse citizenship, the action must have been prosecuted in the State court.

This being true, then the decision of the Court of Appeals, jurisdiction to render which was acquired by our appeal from the District Court, is final on the merits. It necessarily follows, there-

fore, that on the merits, the appeal of Moody & Son to this Court should be dismissed and the judgment appealed from affirmed.

The result is, if the contention of Moody & Son as to the character of this action is correct, that they have no right to appeal and ask the opinion of this Court on the question of the jurisdiction of the Circuit Court of Appeals, for that they have lost that right by their laches, as set out by our Proposition One and the argument thereof. And they have no right to ask this Court to review this case on the merits, for the reason that the judgment and decree of the Circuit Court of Appeals is final.

DIVISION 2. JURISDICTION OF CIRCUIT COURT OF APPEALS.

ARGUMENT OF PROPOSITIONS THREE, FOUR, FIVE AND SIX.

The facts: This action was inaugurated by the petition filed by the Trustees in the District Court on November 28, 1910, seeking authority to sell all the real estate of the bankrupt, including his homestead, free and clear of liens, and free and clear of the bankrupt's wife's inchoate right of dower. (Trans. pages 3-7).

On January 6, 1911, the bank filed its answer thereto, the same, as against Moody & Son, being a petition in intervention, or cross-petition, or cross-bill, and claiming, as against Moody & Son, that their mortgage, in so far as it purports to cover the homestead, was of no validity. (Trans. page 8, par. 5).

The bank further claimed that the adjudication did not vest title to the homestead in the Trustees, same being exempt property. It further set up that the District Court had no jurisdiction to make any order affecting the homestead except to determine its limits, etc. (Trans. page 10, par. 12). It consented, however, to a sale of the homestead in common with the remaining 1040 acres, provided the same was without prejudice to its rights in the proceeds of the homestead. After due notice, order of sale was granted, July 5, 1911, and the liens upon the real estate transferred to the funds. (Trans. pages 12-13).

Subsequently the action, as between Moody & Son and the bank, came on for hearing, and the District Court, on May 24, 1912, filed its finding of facts and conclusions of law, (Trans. pages 15-21), and on the same day entered its decree pursuant thereto. (Trans. page 21), apportioning the proceeds of the homestead between the first mortgagee, R. A. Crawford, Admr., and the bank.

It is apparent, as shown in the finding of facts and conclusions of law of the learned District Court, that the only persons interested in the matter determined by said decree are Moody & Son and the

bank. All other lien holders had been fully paid, all costs of administration had been paid, and the only question remaining was as to the division of the remainder of the money in the hands of the trustees, as between Moody & Son and the bank.

The bank duly appealed from said decree to the Circuit Court of Appeals. That appeal was submitted to that Court without suggestion by Moody & Son that the Court of Appeals was without jurisdiction to review the case *by appeal.*

After the original opinion of the Circuit Court of Appeals was handed down reversing the District Court, Moody & Son filed motion to vacate the decree, to the end that the Circuit Court of Appeals might make finding of facts and conclusions of law, upon which Moody & Son might prosecute an appeal to this Court, as provided in Order 36 of the "General Orders in Bankruptcy."

After the Court of Appeals, by sustaining their said motion, had vacated said decree, then Moody & Son for the first time challenged the jurisdiction of the Court of Appeals in their motion to dismiss. That motion was duly submitted and overruled, as shown in the supplemental opinion of the Court of Appeals of December 11, 1913. (Trans. pages 35-39). Also 209 Fed. 775.

The Court of Appeals, in its original opinion on the merits of the case, held that the action, notwithstanding the manner in which it had been brought and the pleadings denominated and filed, was really an action in equity, by the bank against Moody & Son, seeking the cancelation of their mortgage, in so far as it purported to convey the homestead, and the appropriation of the proceeds of the homestead, to the payment *pro tanto* of the bank's mortgage.

If the Court of Appeals was correct in this, then this matter presented a "controversy arising in bankruptcy proceedings," and not a "proceeding in bankruptcy" proper. It follows that the right of appeal from the District Court to the Court of Appeals existed and was properly exercised; and that the overruling of the motion of Moody & Son to dismiss the appeal because not being the proper form of remedy, was correct, and should be affirmed in this honorable Court.

We submit that in the light of the decisions of this Court to which we now call attention, there is no doubt that the matter in dispute between Moody & Son and the bank is a proceeding in equity, with the right of appeal, to the bank, from the District Court to the Circuit Court of Appeals.

Appellate Procedure: The procedure whereby a case is removed or carried from the District Court to the Court of Appeals for review, is a matter resulting in opinions of the Circuit Courts of Appeal in the different Circuits which are not altogether har-

monious or reconcilable. Because of such want of harmony in the holdings of the different Courts of Appeal in the different Circuits, the decisions of this, the Supreme Court of the United States, being superior to, and binding upon, the different Courts of Appeal, are final. We submit that this Court has spoken upon the questions involved in the motion of Moody & Son to dismiss. Such decisions to which we now turn our attention, are adverse to said motion.

United States Supreme Court decisions.

Greey vs. Dockendorff, 231 U. S. 513 (58 L. ed. 339), presented a dispute between the assignee of certain accounts of the bankrupt, and the trustee, as to who was entitled to the proceeds of said accounts, then in the hands of the trustee in bankruptcy. This Court, per MR. JUSTICE HOLMES, in its opinion of date December 15, 1913, held that the case presented, a "controversy arising in bankruptcy proceedings," and not a "proceeding in bankruptcy" proper, and that the right of appeal existed, citing *Knapp vs. Milwaukee Trust Company*, 216 U. S. 545, (54 L. Ed. 610).

Houghton, Trustee, vs. Burden, 228 U. S. 161, (57 L. Ed. 780), was decided by this Court April 7, 1913. It was an appeal from the Circuit Court of Appeals, Second Circuit, to the Supreme Court, to review a decree of said Court of Appeals, which reversed a decree of the District Court for the Southern District of New York, dismissing a petition in intervention, in Bankruptcy proceedings. The facts were as follows:

The claimant, Burden, had loaned the Bankrupt $10,000, and as security therefor took an assignment of certain book accounts, aggregating $14,000. Shortly afterwards, a trustee in Bankruptcy was appointed, and took possession of the Bankrupt's books, including the said assigned accounts. The claimant filed a petition in intervention in the Bankruptcy case, asserting his title to the assigned accounts, and the proceeds thereof. The District Court dismissed intervenor's petition. The Court of Appeals reversed the District Court. This Court decided that the Court of Appeals had jurisdiction by the appeal thereto from the District Court, holding that the matter was a "controversy arising in a Bankruptcy proceeding," and appealable under Section 24-a of the Bankrupt Act.

In the instant case, the Century Savings Bank was asserting its lien upon, and right to, the homestead of the Bankrupt, or its proceeds after the sale thereof. It comes squarely, in principle, within the foregoing opinion, and was therefore reviewable in the Circuit Court of Appeals on appeal. This, we submit, is apparent in the light of the language used by MR. JUSTICE LURTON in delivering

the opinion of this Court upon the question of jurisdiction of the Circuit Court of Appeals, from which we quote as follows:

> "This is an appeal from a decree determining a controversy arising in a bankruptcy proceeding. * * *
>
> Burden intervened in the Bankruptcy case and filed a petition, in which he asserted his title to the assigned accounts and to any proceeds collected by the receiver. * * *
>
> Such an intervention for the purpose of asserting a title or claim to property in the possession of the bankrupt's trustee is an *intervention in equity,* and a decree is reviewable *by an appeal* to the circuit court of appeals in the exercise of its general appellate powers in equity cases under §24a of the bankrupt act. Loveland, Bankr. 4th Ed. §§ 826 to 829; *Hewit v. Berlin Mach. Works,* 194 U. S. 296, 300, 48, L. Ed. 986, 987, 24 Sup. Ct. Rep. 690; *Knapp v. Milwaukee Trust Co.,* 216 U. S. 545, 54 L. Ed. 610; 30 Sup. Ct. Rep. 412."

In Re Loving, 224 U. S. 183, 56 Law Ed. 725, was a hearing in this Court, on certificate from the Circuit Court of Appeals for the Sixth Circuit, presenting the question as to the right of the court of Appeals to review by *revisory petition* under Section 24-b, an order establishing a claim as a lien against a Bankrupt estate, which question was answered in the negative.

The claimant filed its claim against the estate of the Bankrupt in the sum of $11,125.00, and the District Court allowed said claim and established it as a lien upon the assets of the Bankrupt's estate. Thereupon the trustee filed his petition for the revision of said order of the District Court, in said Circuit Court of Appeals, under Section 24-b.

No question of fact was made in the Circuit Court of Appeals, the only complaint being that the District Court erred in establishing the claim as a lien and giving it priority of payment. This Court held that the Circuit Court of Appeals was without jurisdiction to review the said order of the District Court *under petition for revision* under Section 24-b, and answered the certified question accordingly.

In making such negative answer, this Court regarded the controversy as a "proceeding arising in the settlement of the estate of a Bankrupt," and held that it was reviewable by appeal in the Circuit Court of Appeals not only under the Court of Appeals Act, but under Section 24-a of the Bankrupt Act as well, clearly sustaining our contention on the instant motion before the Court, and

as clearly overruling the contention of opposing counsel, upon which their motion to dismiss is founded.

And if we understand that part of the opinion found on pages 186-187, and in the Law edition second column on page 726, it was also held that a third right of appeal was given under Section 25-a, because the matter was really the establishment of a claim in excess of $500.00, though the real question was only as to whether or not it constituted a lien upon the assets of the Bankrupt. We quote that part of the opinion as follows:

> "Section 25 provides for appeals and writs of error in bankruptcy proceedings to the circuit court of appeals and to this court. These sections of the bankruptcy act were under consideration in this court in the case of *Coder v. Arts*, 213 U. S. 223, 54 L. Ed. 772, 29 Sup. Ct. Rep. 436, 16 A. & E. Ann. Cas. 1008, and it was there held "controversies arising in bankruptcy proceedings, as distinguished from bankruptcy proceedings, were appealable to the circuit court of appeals under the court of appeals act of March 3, 1891 (26 Stat. at L. 826, Chap. 517, U. S. Comp. Stat. 1901, p. 488); that where a claim alleged to be secured by a lien upon the bankrupt's estate was filed against a bankrupt for allowance, *an appeal was given under § 25a* to the circuit court of appeals, as from a judgment allowing or rejecting a claim of $500 or over, and that from any final decision of the circuit court of appeals allowing or rejecting a claim coming within § 25b, a further appeal was given to this court. Under the decision of this court in that case there can be no doubt that the bank in this case instituted a proceeding in bankruptcy, *which was appealable under § 25a* to the circuit court of appeals. The fact that after the adjudication of the claim the trustee made no objection to its allowance as a valid claim, but intended only to contest its validity as a lien upon the bankrupt's estate, *made no difference as to the appellate character of the controversy.* A bankruptcy proceeding was instituted as to the claim and its alleged lien, as distinguished from a controversy arising in a bankruptcy proceeding, and the appeal was under § 25a to the circuit court of appeals. *Coder v. Arts, supra.*"

Knapp vs. Milwaukee Trust Company, 216 U. S. 545, 54 Law Ed. 610, was an appeal from the Circuit Court of Appeals, Seventh Circuit, to review a decree which affirmed a decree of the

District Court for the Eastern District of Wisconsin, denying the right of an intervenor to a chattel mortgage lien on the property of the Bankrupt.

In that case the trustee filed a petition to sell all the property of the Bankrupt. The intervenor asked to have his chattel mortgage established as the first lien on the property and satisfied out of the proceeds of the sale. The property was sold and the question was as to the lien of the mortgage upon the fund. The trustee set up that the mortgage was fraudulent and void. The District Court held the mortgage fraudulent and void.

Upon appeal, the Circuit Court of Appeals affirmed the decree of the District Court, and held the mortgage void. Thereupon an appeal was prosecuted to this Court.

In discussing a motion to dismiss the appeal in this Court, MR. JUSTICE DAY, in describing the controversy, made use of the following language:

> "The case at bar is not of that class; it is an intervention in a bankruptcy proceeding, and, within the meaning of the act, a controversy arising in a bankruptcy proceeding, and the appellate jurisdiction is the same as in like cases under the court of appeals act. Bankruptcy act, § 24a, *Hewit v. Berlin Mach. Works*, 194 U. S. 296, 48 L. Ed. 986, 24 Sup. Ct. Rep. 690; *Coder v. Arts*, 213 U. S. 223, 53 L. Ed. 772, 29 Sup. Ct. Rep. 436, and the cases therein cited."

We submit that the instant case, wherein the Century Savings Bank claims the proceeds of the sale of the Bankrupt's homestead, falls within the ruling in the *Knapp* case, and is not a "proceeding in Bankruptcy" proper, but is a "controversy arising in a Bankruptcy proceeding" or a "controversy arising in the settlement of the estate of a Bankrupt." It is therefore appealable from the District Court to the Circuit Court of Appeals under Section 24-a of the Bankrupt Act, and also under the Court of Appeals Act as well.

Coder vs. Arts, 213 U. S. 223, 53 Law Ed. 712, was an appeal to this Court from the Court of Appeals for the Eighth Circuit, which, on appeal from the District Court for the Southern District of Iowa, allowed certain claims against the estate of the Bankrupt and upheld mortgages executed to secure same. The claimant filed his claim for much more than $500.00, against the estate of the Bankrupt, and asserted that it was a preferred claim, being

secured by a mortgage upon real estate. The District Court allowed the claim as a preferred claim.

Thereupon the trustee carried the case to the Court of Appeals by *petition for review*, under Section 24-b, and also by appeal. That Court *dismissed the petition for review*, but entertained jurisdiction on the appeal. Thereupon the case was carried to this Court on appeal, by the trustee.

It was contended in this Court that the appeal should have been dismissed by the Circuit Court of Appeals, for want of jurisdiction. In passing upon the question, this Court made use of the following language:

> "It is contended by the appellee that the case should be dismissed for want of jurisdiction of the circuit court of appeals and of this court. Questions of the jurisdiction in bankruptcy, particularly of the appellate courts, have given rise to numerous and not altogether reconcilable decisions. * * * Section 25 of the act provides for appeals in bankruptcy proceedings, and in such proceedings appeals may be taken from the courts of bankruptcy to the circuit courts of appeals in three classes of cases.
>
> We are concerned in this case with the third class, "from a judgment allowing or rejecting a debt or claim of five hundred dollars or over." The appeal must be taken within ten days after the judgment.
>
> It is therefore apparent that the mode of appeal in a given case depends upon the character of the proceeding. And the question to be solved in such cases is, Does the case present a proceeding in bankruptcy, or is it a controversy arising in bankruptcy proceedings?"

This Court then cited a number of its own opinions, and then held that the proceeding was reviewable on appeal in the Circuit Court of Appeals, under Section 25-a, as will appear from the following language:

> "It is insisted, however, that inasmuch as the trustee in the case at bar made no objection to the amount found due upon the notes by the district court, and only sought by his appeal to further contest the right to the security asserted by Arts, that his sole remedy was under § 24b,—to have a revision in the circuit court of appeals by a petition filed for that purpose, and that the circuit court of appeals should have dismissed the attempted appeal. But

> we are of opinion that *the character of the proceeding must be determined by the nature of the claim* set up against the trustee in bankruptcy, and as § 25a, 3 gives an appeal to the court of appeals from a judgment allowing or rejecting a debt or claim of $500 or over, that the appeal was properly allowed in this case, and brought before the circuit court of appeals the validity of the claim and the lien asserted securing the debt."

In the instant case, the claim of the Century Savings Bank was for $20,000.00, in round numbers, and was asserted to be secured by mortgage upon the homestead. In the Court of Appeals, and in fact in the District Court as well, no question arose as to the amount of the claim. The question is as to whether or not the property alleged to be pledged for its security shall be so applied. We submit we come squarely within the ruling in the *"Coder case,"* and that our right of appeal to the Court of Appeals exists under Section 25-a of the Bankrupt Act.

Furthermore, if the matter shall be regarded as a "controversy arising out of the settlement of the estate of a Bankrupt," the right of appeal is further granted by Section 24-a of the Bankrupt Act, and also by the Court of Appeals Act as well.

It will be further remembered that our contention is that the proceeds of the homestead are no part of the assets of the Bankrupt's estate.

First National Bank of Chicago vs. Chicago Title & Trust Co., et al., 198 U. S. 280, 49 Law. 1051, arose out of the following facts:

One Rogers was a wholesale dealer in seeds, and was adjudged a bankrupt by the District Court, Northern District of Illinois. The Title & Trust Company was duly appointed trustee. Prior to the Bankruptcy, Rogers deposited with the National Storage Company, doing a warehousing business, certain seed, and received in evidence thereof warehouse receipts. Some of these receipts were pledged to the First National Bank of Chicago, and others to Rogers & Brother. The Title & Trust Company, upon its appointment as trustee, took possession of the seed covered by the warehouse receipts, and filed a petition asking instructions of the Bankruptcy Court with respect to a sale thereof.

The First National Bank and Rogers & Brother appeared to said petition, and objected to the jurisdiction of the District Court over said seed. The District Court found that the trustee was in possession of the seed at the time of the bankruptcy, that it had jurisdiction in the premises, and ordered the seed to be

sold and the proceeds deposited with said First National Bank, subject to further order, which was done.

Thereupon the bank and Rogers & Brother filed petitions asking payment of their claims out of said proceeds. The trustee and certain of the creditors answered, denying the right of the petitioners to the fund. The matter coming on for hearing, the District Court again held that the seed was in the possession of the trustee at the time of the bankruptcy, and also that it had jurisdiction in the premises; and the Court further held that the proceeds of the sale should be retained by the First National Bank and applied upon its claim, and that of Rogers & Brother.

Thereupon the trustee and one of the creditors severally perfected appeals from said order of the District Court to the Circuit Court of Appeals, Seventh Circuit.

The Circuit Court of Appeals held that the District Court erred in deciding the said question of fact as to the possession of the seed, and overruled the District Court upon said question of fact, and remanded the cause to the District Court, with instructions to enter a decree for said trustee.

The petitioner then filed, in this Court a petition for the writ of certiorari, said petition alleging that the trustee and said creditors had no right of appeal from the District Court, and hence the Circuit Court of Appeals was without jurisdiction of the subject matter, and its order reversing the decree of the District Court was null and void; and alleging further that if said appeals from the District Court were to be taken as and for petitions for revision, that in such case the Circuit Court of Appeals was limited in jurisdiction to a revision of the District Court in matters of law only, and that in reversing the District Court upon the question of fact as to possession of the seed, the Circuit Court of Appeals acted without jurisdiction. The granting of the writ was objected to by the trustee and the said creditor, on the ground that the Bankrupt turned over to the receiver the seed in dispute; that the proceeding was a plenary suit to the institution of which, in the District Court sitting in bankruptcy, the petitioners, as adverse parties, had consented. The writ was granted.

Thereupon a motion to quash the writ was filed by the trustee and said creditor, on the ground that the matters involved and determined were "controversies arising in Bankruptcy proceedings", as distinguished from "proceedings in Bankruptcy," and that the remedy was by writ of error or by appeal, rather than by certiorari.

In determining the contoversy, the Supreme Court of the United States, speaking by MR. CHIEF JUSTICE FULLER, held that if the proceedings in the District Court was a "proceeding in Bank-

ruptcy," and not an independent suit, no appeal lay to the Circuit Court of Appeals, as to the facts in the case, and the jurisdiction of that Court was confined to revision in matter of law, on petition, under Section 24-b of the Bankrupt Act. This Court further held that the District Court was without jurisdiction to determine the adverse claims to the seed, *which was not in possession of the trustee, by summary proceedings,* whether absolute title or only a lien was asserted.

This Court further held that since the petitioners had objected to the jurisdiction of the District Court, they did not abandon that objection or consent to an exercise of jurisdiction against which they protested, notwithstanding they did consent to the sale of the seed; and that but for such consent, the State Court, under the circumstances, was the proper forum, and the controversy should have been disposed of there. The sale, though consented to, did not change the situation. The proceeds stood in place of the property, and the order returning the proceeds to the trustee was equivalent to an order returning the seed to the trustee.

This Court then summed the case up and held that the proceeding was a "proceeding in Bankruptcy," and being such, an appeal from the decree of the District Court did not lie under Section 25-a, and the supervisory power of the Court of Appeals could be invoked only by petition under Section 24-b. Being a "proceeding in Bankruptcy," it was further held that in as much as appeal would not lie under the circumstances, under Section 25-a, and in as much as under a petition for revision, under Section 24-b, the Court of Appeals was limited to supervisory power over the District Court in matters of law only, its decree reversing the District Court on matters of fact was erroneous, and therefore the Supreme Court reversed the decree of the Circuit Court of Appeals. The reversal, however, was accompanied by an order to the Circuit Court of Appeals to dismiss the appeal to that Court, and remand the cause to the District Court for proceedings conforming to the opinion of the Supreme Court.

And the Supreme Court further expressly held that the District Court, upon its own findings, should have declined to retain jurisdiction, and that the Circuit Court of Appeals, in reversing the District Court and ordering the return of the money to the trustee, should have directed that such return be without prejudice to the rights of petitioners to litigate their rights to the fund in the State Court.

The foregoing case, though cited by Moody & Son does not involve the question presented by their motion to dismiss, for the reason that the present case is not a "proceeding in Bankruptcy"

proper, but an independent suit arising out of the settlement of the estate of a Bankrupt, tried, in equity, by consent of all concerned. The Supreme Court, in the foregoing cited case, was dealing with a proceeding in Bankruptcy proper, and construed Sections 24-b and 25-a of the Bankrupt Act. In the instant case, the same not being a "proceeding in Bankruptcy," no claim to the right of appeal is made under said Section 24-b. The instant case being a "controversy arising out of the settlement of the estate of a Bankrupt," and being equitable in character, an appeal lies therein from the District Court, to the Circuit Court of Appeals, not only under Section 24-a of the Bankrupt Act, but also under Section 11 of the Court of Appeals Act of March 3, 1891, as well. Moody & Sons first declare that the instant case is a "proceeding in Bankruptcy," and make their argument accordingly, to the effect that no right of appeal obtains therein, under either Sections 24-a, 24-b or 25-a of the Bankrupt Act.

We assert that the controversy here is not a "proceeding in Bankruptcy", but a "controversy arising in the settlement of the estate of a Bankrupt," and equitable in character, and that a treble right of appeal obtains, the first under Section 24-a of the Bankrupt Act, the second under Section 25a-3, and the third under the Court of Appeals Act, itself.

It will be remembered that this controversy originated by the trustees filing petition in the District Court, asking leave to sell all the real estate of the Bankrupt, including his homestead, free and clear of liens. (Trans. 3 to 7.) To that petition the Century Savings Bank answered, (Trans. 7), denying the jurisdiction of the District Court over the homestead. (Trans. 10, Par. 12.) Consent, however, was given to the sale of the homestead, in connection with the remainder of the land, to the end that the best price obtainable therefor might be realized, but with the distinct understanding, as shown in the decree of the Court itself, that such consent to said sale should merely transfer the bank's rights from the land to its proceeds. (Trans. 10, Par. 13. Order for Sale. Trans. 13.) The sale was had upon this express condition

Thereafter, by consent of all parties to the record, the District Court proceeded to try the controversies concerning the homestead, as an equitable action, treating the same as an independent "controversy arising in Bankruptcy proceedings," and, in effect, the District Court, by regular and formal equitable decree, awarded to Moody and Son, of the proceeds of the sale of the homestead, the sum of $5,052.63, and Moody & Son are before this Court asserting their right to said sum. The District Court was without jurisdiction to try the case, or enter such decree, unless the case was

a "controversy arising in Bankruptcy proceedings," triable in equity, by consent of all parties appearing before the Court. The Court of Appeals so adjudged. The original opinion of that Court at its close, says:

> "The case below was in equity and is considered here on the appeal. The writ of error which was also prosecuted is dismissed.
>
> The order of the District Court is reversed and the matter is remanded for further proceedings in conformity with this opinion."

The appeal to the Court of Appeals was from the decree entered in the District Court. The proceeding, in its essential facts, is quite similar to the *First National Bank case*, 198 U. S. 280, but being a "controversy arising out of the settlement of the estate of a Bankrupt," the right of appeal does exist, under Section 24-a and Section 25-a-3 of the Bankrupt Act and under the Court of Appeals Act.

If, however, it should finally be held by this honorable Court that the instant case is a "proceeding in Bankruptcy" proper, and that therefore no right of appeal obtains, under Section 24-a or 25-a of the Bankrupt Act, and if this court further holds that it has jurisdiction of Moody & Son's appeal to this court, notwithstanding our objections thereto made in propositions 1 and 2 of this brief, then and in that case, and in conformity with the foregoing opinion of this Court, the District Court was without jurisdiction, and if this Court should sustain the motion to dismiss, it should remand the case to the District Court, with instructions to sustain the plea of the Century Savings Bank to the jurisdiction of the District Court over the homestead and its proceeds, with leave to the Bank to litigate its right to the fund arising from the sale of the homestead, in the State Court, the fund being held a reasonable time in the hands of the trustee, to permit the same to be done.

We submit further, that the decisions of this Court, later in time than the decision of the *First National Bank* case, 198 U. S. 280, are authoritative and controlling. If there is any want of harmony between said several decisons and the holding in the *First National Bank* case, then said subsequent decision shall obtain.

We submit, further, however, that there is no want of harmony between the *First National Bank* case and the subsequent decisions, as was pointed out by MR. JUSTICE DAY, in deciding the *Coder* case, wherein he used the following language:

"A reference to the adjudications in this court may assist in clearing the matter. *Hewit v. Berlin Mach. Works,* 194 U. S. 296, 48 L. Ed. 986, 24 Sup. Ct. Rep. 690, is an illustration of a controversy arising in bankruptcy proceedings (§ 24-a) wherein the appeal is under § 6 of the act of March 3, 1891. (26 Stat. at L. 828, Chap. 517, U. S. Comp. Stat. 1901, p. 549.) In that case the Berlin Machine Works asserted title to the property in the possession of the trustee, and intervened in the bankruptcy proceedings, raising a distinct and separable issue as to the title to property in the possession of the trustee. This court, speaking through the chief justice, held that the case presented a controversy arising in bankruptcy proceedings, appealable to the court of appeals as other cases under § 6 of the act of March 3, 1891. Nor is the decision in the *Berlin Mach. Works* case inconsistent with *First Nat. Bank v. Chicago Title & T. Co.,* 198 U. S. 280, 49 L. Ed. 1051, 25 Sup. Ct. Rep. 693. In that case there was an attempt on the part of the trustee to invoke an adjudication as to the title to property *which the district court found not to be in the possession of the trustee,* notwithstanding the petition of the trustee had averred possession, and it was held that, *when this fact appeared, the district court had no longer jurisdiction of the case,* under the doctrine laid down in *Bardes v. First Nat. Bank, supra,* and ought to have dismissed the case."

We further submit that when the *First National Bank* case was decided, the District Court of the United States did not have jurisdiction to adjudge title to property not in the possession of the trustee. Indeed, we think we are safe in saying that at the time of the decision in the *First National Bank case,* the District Court was not vested with equitable jurisdiction in a suit of the present character, but the same was vested in the Circuit Court. When the Circuit Court was abolished by the Act approved March 3, 1911, and taking effect January 1, 1912, the equitable jurisdiction theretofore vested in and exercised by the Circuit Court, was vested in the District Court. The District Court therefore had full plenary, equitable jurisdiction, when this instant case was heard and determined by it, on to wit: May 24, 1912.

Hewit, Trustee, vs. Berlin Machinery Works, 194 U. S. 296, 48 Law Ed. 986, was an appeal to this Court from the Circuit Court of Appeals, Second Circuit, to review a judgment which affirmed a judgment of the District Court for the Eastern District

of New York, holding that certain property in the hands of the trustee belonged to the claimant, the Berlin Machinery Works. The trustee applied to the District Court for an order to sell certain machinery as the property of the Bankrupt. The Berlin Mach. Works filed its petition claiming to be the owner of said machines, and asking possession thereof, or that it be first paid out of the proceeds of the sale of the machines. The District Court held that the claimant was the owner of the machines, and entitled to the same to the proceeds thereof arising from the sale of same.

The trustee then filed petition for revision in matter of law, under Section 24-b; and in addition thereto appealed to the Circuit Court of Appeals from the judgment of the District Court. The Circuit Court of Appeals affirmed the judgment of the District Court, and this Court again affirmed said judgment.

This Court, speaking through MR. CHIEF JUSTICE FULLER, held that the proceeding was a "controversy arising in Bankruptcy proceedings," or a "controversy arising in the settlement of the estate of a Bankrupt," and might be carried by appeal from the District Court to the Court of Appeals, and in so doing made use of the following language:

> "If the trustee had carried the case to the circuit court of appeals on petition for supervision and revision under § 24-b of the bankruptcy law (30 Stat. at L. 553, Chap. 541, U. S. Comp. Stat. 1901, p. 3432), the case would have fallen within *Holden v. Stratton*, 191 U. S. 115, *ante*, 116, 24 Sup. Ct. Rep. 45, and the appeal to this court would have failed. But he took it there by appeal, though accompanied by some apparent effort to avail himself also of the other method. And as the Berlin Machine Works asserted title to the property in the possession of the trustee by an intervention raising a distinct and separable issue, the controversy may be treated as one of those 'controversies arising in bankruptcy proceedings' over which *the circuit court of appeals could, under § 24a, exercise appellate jurisdiction* as in other cases. Section 25a relates to appeals from judgments in certain enumerated steps in bankruptcy proceedings, in respect of which special provision therefor was required, (*Holden v. Stratton*, 191 U. S. 115, *ante*, 116, 24 Sup. Ct. Rep. 45), *while § 24a relates to controversies arising in bankruptcy proceedings* in the exercise by the bankruptcy courts of the jurisdiction vested in them at law and in equity by § 2, to settle the estates of bankrupts, and to determine controversies in relation thereto. *Hutchin-*

son v. Otis, 190 U. S. 552, 47 L. Ed. 1179, 23 Sup. Ct. Rep. 778; *Burleigh v. Foreman*, 125 Fed. 217."

We submit the *Hewit* case is on all fours with the instant case, and is a direct authority for the right of appeal from the judgment of the District Court in the instant case to the Court of Appeals. Because thereof, the motion to dismiss said appeal was correctly overruled.

Holden vs. Stratton, Trustee, 191 U. S. 115, 48 Law 116, was an appeal to this Court from the Circuit Court of Appeals for the Ninth Circuit, whose decision reviewed and reversed an order of the District Court for the District of Washington, allowing an exemption in bankruptcy proceedings.

The Bankrupt, in the District Court, applied for exemption, in his favor, of two certain life insurance policies, then in the hands of his trustee. The District Court held the policies to be exempt to the Bankrupt. Thereupon the trustee filed petition in the Circuit Court of Appeals for the Ninth Circuit to revise said judgment. The Circuit Court of Appeals held the policies were not exempt, and reversed the District Court. Thereupon, the Bankrupt appealed from the Circuit Court of Appeals to this Court.

This Court, speaking through MR. CHIEF JUSTICE FULLER, decided the following propositions:

> A. Under the record in the case, no appeal would lie from the Circuit Court of Appeals to the Supreme Court, but the remedy was by certiorari.
>
> B. No appeal, under the record in the case, could be taken from the District Court to the Circuit Court of Appeals, under Section 25-a of the Bankrupt Act, for the reason that the order of the District Court was not made in one of the three (3) classes of cases specified in said Section 25-a.

This case has no bearing upon the controversy before this honorable Court. The cited case was a "proceeding in Bankruptcy," wherein the Bankrupt claimed an exemption. The District Court having allowed the claim, the trustee, for the purpose of having that order reviewed in the Court of Appeals, proceeded, and properly proceeded, by petition for revision, filed in that Court, with the result that the order of the District Court was reversed. When the Bankrupt then appealed to the Supreme Court, that Court decided that he had selected the wrong remedy, and

should have proceeded by certiorari, instead of by appeal, and thereupon dismissed the appeal.

Again, the construction of 24-a of the Bankrupt Act was not in the mind of either the Circuit Court of Appeals or this Court, in the history of the case.

Now in the instant case, we have a "controversy arising in the settlement of the estate of a Bankrupt," which controversy is independent, and equitable in character. It is not affected in any wise by the provisions of Section 24-b of the Bankrupt Act. It is affected, however, by Section 24-a and Section 25-a-3 of the Bankrupt Act, under which Sections the right of appeal is given. The additional right of appeal in the instant case is also given by the Court of Appeals Act of March 3, 1891.

To put our position in a nut shell, we beg leave to suggest that decisions in "proceedings in Bankruptcy", construing Section 24-b of the Bankrupt Act, are not applicable to the instant case, because it is a "controversy arising in the settlement of the estate of the Bankrupt," independent, plenary and equitable in character, and the decision of the District Court therein is reviewable on appeal in the Circuit Court of Appeals, not only under Section 24-a and Section 25-a-3 of the Bankrupt Act, but under the Court of Appeals Act, as well.

Eighth Circuit Court of Appeals Decisions:

We submit that the rulings on this question of jurisdiction made in the Eighth Circuit Court of Appeals, not only in the instant case, but in prior and also in subsequent cases, as well, are in full accord and harmony with those of this Court on the same point.

While it seems to us to be a work of supererogation, or like "carrying coals to Newcastle," to cite additional authorities in support of our contention on the motion of Moody & Son to dismiss our appeal to the Court of Appeals, we call the attention of this Court to the following decisions in the Eighth Circuit Court, wherein the ruling in the instant case has been cited with approval and followed.

In *New Hampshire Savings Bank vs. Varner*, 216 Fed. 721, an appeal was prosecuted to the Eighth Circuit Court of Appeals from orders of the District Court denying priority to mortgages held by appellants over mechanic's liens held by appellees. The case was heard in the Circuit Court of Appeals before SANBORN and CARLAND, *Circuit Judges*, and REED, *District Judge*. In the opinion, pronounced by REED, *District Judge*, August 29, 1914, the order of the Circuit Court of Appeals overruling the motion of

Moody & Son to dismiss for want of jurisdiction, made in the instant case, was cited with approval, and followed, the Court making use of the following language:

> *"In Re Hartzell,* 209 Fed. 775, 126 C. C. A. 499, there was asserted in effect, by way of intervention in the bankruptcy proceedings, a lien alone upon the property of the bankrupt, and it was held that an appeal in such case was also an appropriate remedy to review the decision of the court of bankruptcy denying such lien."

In *Stern vs. Merchants' National Bank,* 216 Federal 862, a controversy arose among certain creditors of the bankrupt as to which was entitled to the security furnished by a certain bond. The case was heard in the Circuit Court of Appeals before HOOK, ADAMS AND SMITH, *Circuit Judges* and decided August 20, 1914. In the opinion of the Court, ADAMS, *Circuit Judge,* also cited said ruling complained of by Moody & Son in the instant case, and approved and followed it, using the following language:

> "The fact that the decree incidentally established a lien and affected the interests of the Bank of Topeka does not destroy the essential character of the proceeding, to establish a preferential claim against certain assets of the bankrupt. *Century Savings Bank v. Robert Moody & Son,* 126 C. C. A. 449, 209 Fed. 775. The case just cited is also authority for the proposition that the matter in judgment in this case is a 'controversy arising in bankruptcy proceedings,' and reviewable by appeal under the provisions of section 24a also."

Thomas vs. Woods, 173 Fed. 585, was an appeal to the Court of Appeals from the District Court for the District of Kansas. The trustee filed petition in the District Court asking that the title to certain real estate be quieted in the trustee, as against the defendants, and that said real estate be sold free and clear of liens. Defendants filed cross bills, setting up their alleged title. One of the defendants filed a plea denying the jurisdiction of the Court, which plea was overruled. Said defendant then answered, setting up her interest in the real estate and asking that said interest be protected, in the event the Court continued to hold that it had jurisdiction. The District Court found against the defendant and entered decree accordingly, from which decree the defendant appealed to the Court of Appeals.

The opinion of that Court, pronounced by AMIDON, *District Judge*, because of its elucidation of the terms "Bankruptcy proceedings" and "controversies arising in Bankruptcy proceedings," and because of its cogency of reasoning and clearness of statement, may well serve as a model for all Courts. The opinion proper begins with the following words:

> "At the outset we are confronted with the question which has become a part of nearly every bankruptcy cause in an appellate court, namely: Should the review have been sought by appeal or petition?"

Then follows a reference to the confusion theretofore existing with respect to the procedure on appeal from the District Court, in Bankruptcy proceedings, with the result that the fog of confusion overhanging this subject is dispelled by the light of the Court's reasoning. The Court then proceeds as follows:

> "The present appeal, however, would have been proper under any interpretation of section 24 of the bankruptcy act. This proceeding was instituted by the trustee to have certain adverse claims and liens upon property belonging to the estate declared void and for a sale of the property free and clear of the same. It involves every attribute of a familiar suit in equity. It can be distinguished from such suit only by the fact that it was instituted by petition instead of bill, and the adverse parties were brought before the court by citation instead of subpoena. There are some cases which suggest that if such a proceeding is instituted by a petition, filed by the adverse claimant for the enforcement of his right, and the trustee is cited to answer such a petition, this constitutes "a controversy in a bankruptcy proceeding," which may be reviewed by appeal; but if the parties be reversed, and the trustee files a petition charging that the adverse claim or lien is void, and asking that the property be sold free and clear of it, and the adverse claimant is cited in to answer such a petition, this constitutes not a "controversy," but a "proceeding in bankruptcy proper," and can be reviewed as to matters of law only under section 24b. *Morgan v. First National Bank*, 145 Fed. 466, 76 C. C. A. 236; *In re McMahon*, 147 Fed. 684, 689, 77 C. C. A. 668. *In our judgment such a distinction is wholly untenable.* If enforced, it would deny to parties having adverse liens or claims upon property belonging to

> the estate the right to review the decision of the court of bankruptcy as to any matter of fact. The consequence of such a holding would be serious. Whether there would be any right of review on questions of fact would depend wholly upon whether the proceeding was instituted by the trustee or by the adverse claimant. In either case the right involved would be the same, and the issue tried would be the same. The only distinction would be that the parties would be reversed upon the record. Surely what constitutes a "controversy," within the meaning of section 24a, *must be determined by the nature of the right involved and the issue tried,* and not by the accidental circumstances as to which party is actor and which defendant. Sound reason can be given why as to the purely administrative steps in a bankruptcy proceeding the decision of the trial court on question of fact should be final. *In re Friend,* 134 Fed. 778, 67 C. C. A. 500. But no sound reason can be given why, in a controversy possessing every attribute of a suit in equity, an aggrieved party should not have the right of review as to questions of fact as well as of law in accordance with the established practice in equity. It ought not to be possible for the trustee to defeat such a right by being first to file a petition."

After thus holding that the controversy was appealable under Section 24-a, reference is made to the producing cause of much of the confusion above mentioned, a misunderstanding of the decision in *First National Bank vs. Title & Trust Company,* 198 U. S. 280, and a correct exposition of the opinion in that case is set forth.

Reference is also made to the construction given the opinion in the *First National Bank* case in *Coder vs. Arts,* 213 U. S. 223, and the court concludes this part of its opinion in the following language:

> "It is manifest that the Supreme Court, if the judgment in *First National Bank v. Title & Trust Company* had properly involved a decision as to the merits, would have decided that appeal was the proper method of bringing the question before the appellate court, for it sustained an appeal on a petition by a trustee to determine the rights of adverse claimants to property in the custody of the court in a later case reported in the same volume, namely, *Whit-*

ney v. Wenman, 198 U. S. 539, 25 Sup. Ct. 778, 49 L. Ed. 1157.

We are of the opinion, therefore, that the case is properly before us on the appeal."

We respectfully submit that in the light of the cases hereinbefore cited, from some of which only we have quoted, there can be no doubt but that the right of appeal existed in the instant case, was properly exercised, and that the motion to dismiss was correctly overruled.

Division 3. The Merits.

Argument of Proposition Seven.

This and the following proposition have to do with the interest of the bank in the homestead, and of the effect thereon, if any, of the waiver of homestead.

The facts are correctly found by the learned District Court and are as follows: On June 11, 1908, the bankrupt and his wife executed mortgage to the bank to secure a loan of $19,513.50. (Trans. page 17, par. 8.) Subsequently, to wit: On August 1, 1908, the husband was adjudicated a bankrupt. On October 14, 1908, some eleven (11) weeks after the adjudication, he, with his wife, voluntarily executed the waiver of homestead, without the knowledge or consent of the bank.

The District court held that thereby the homestead character of the 40 acres was destroyed, and thereupon all the land became non-homestead in character, not only as against the bankrupt, but as against the bank as well. (Trans. page 20, par. 4 and 5.)

The bank contends that under and because of its said mortgage, it acquired an interest in, or, in legal effect, became a purchaser of, said homestead, and that the waiver of the homestead, so made by the mortgagors, could not and did not affect its rights therein; and, notwithstanding or despite the waiver, the homestead character of the 40 acres continued in favor of the bank, with the right to set up and insist upon same, precisely as the mortgagors might have done, had they not executed the bank's mortgage and the waiver.

Iowa Statutes: We submit the rights and equities of the bank, under its said mortgage, are governed by the statutes or laws of this State, (Iowa), and the pertinent decisions of our Supreme Court, and the general principles of equity, pertinent thereto.

We cite and quote from our Code of 1897, the following of our statutes, as bearing upon this contention:

> *Sec. 2972. Exempt.* "The homestead of every family, whether owned by the husband or wife, is exempt from judicial sale, where there is no special declaration of statute to the contrary."
>
> *Sec. 2978. Extent—dwelling—appurtenances—value.* "If within a city or town, it, (the homestead), must not exceed one-half acre in extent, otherwise it must not contain in the aggregate more than forty acres; but if, in either case, its value is less than five hundred dollars, it may be enlarged until it reaches that amount."

It is plain that under these two sections, the homestead was exempt to the bankrupt and his family, from judicial sale in payment of debts, and that the extent thereof was forty acres, the same not being within a city or town plat, and being of the value of more than $500.00. (Point 1.)

Not only is the homestead so exempt because of this statute, (Sec. 2972), but being so exempt, it did not pass to the Trustees under and by virtue of the adjudication of bankruptcy. This is the express provision of Sec. 6 of the Bankruptcy Act. (Point 2.)

We cite also, to the same point, *In re Bailey*, 176 Fed. Rep. 990, a bankruptcy case wherein the effect of a mortgage upon the bankrupt's homestead was considered, and concerning which the Court said:

> "Certain principles of law applicable to this situation are beyond dispute, and may be stated briefly. The title to the homestead property did not pass to the Trustee. The fact that it was mortgaged to certain creditors did not make it assets to be administered in bankruptcy. *Lockwood v. Exchange Bank*, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061, *In re Nye*, 133 Fed. 33, 66 C. C. A. 139. * * * A mortgage constituting an unlawful preference, where it includes both exempt and nonexempt property, is only avoidable by the trustee as to the nonexempt property, and remains a valid mortgage as to the exempt property. *In re Tollett*, 106 Fed. 866, 46 C. C. A. 11, 54 L. R. A. 222; *Vitzthum vs. Large*, (D. C.) 162 Fed. 685; *In re Eash*, (D. C.) 157 Fed. 996." See also *Hull vs. Dicks*, 235 U. S. 584. (59 L. Ed. ___.)

> *Sec. 2974. Conveyance or incumbrance.* "No conveyance or incumbrance of, or contract to convey or incumber the homestead, if the owner is married, is valid, unless the husband and wife join in the execution of the same joint instrument, whether the homestead is exclusively the subject of the contract or not, but such contracts may be enforced as to real estate other than the homestead at the option of the purchaser or incumbrancer."

Because of this Section, the Moody mortgage is invalid, null and void, in so far as it purports to cover the homestead, but it is valid as to the remainder of the 1080 acres. (Point 3.)

Sec. 2976. Liable for debts antedating purchase—by written contract. "The homestead may be sold on execution for debts contracted prior to its acquisition, but in such cases it shall not be sold except to supply any deficiency remaining after exhausting the other property of the debtor liable to execution. It may also be sold for debts created by written contract, executed by the persons having power to convey, and expressly stipulating that it is liable therefor, *but then only for a deficiency remaining after exhausting all other property pledged by the same contract for the payment of the debt.*"

Under this section, the bankrupt could have insisted, even under a direct foreclosure of the Johnson mortgage, that the 920 acres, not embracing the homestead 40 acres, be first sold, and *that the homestead be sold only for a deficiency,* if any. When they were in fact sold by the Trustees, they brought much more than sufficient to pay the Johnson mortgage, thus leaving the homestead clear of an incumbrance, except the bank mortgage. Under the facts in this case, Moody could in no manner insist upon marshalling assets, as against the bankrupt, so as to apply any part of the homestead to the payment of the Johnson mortgage. (Point 4.)

> *Sec. 4032. Plan of division of land.* "At any time before nine o'clock a. m. of the day of the sale, the debtor may deliver to the officer a plan of division of the land levied on, subscribed by him, and in that case the officer shall sell, according to said plan, so much of the land as may be necessary to satisfy the debt and costs, and no more. If no such plan is furnished the officer may sell without any division."

Under this section, and even on a supposed direct foreclosure of the Johnson mortgage, in which decree was rendered by default, for want of appearance or plea or answer, the bankrupt could have insisted upon a sale of the said 920 acres before any sale of the homestead could be had, by following the provisions of this section. The right to protect the homestead from sale in such case is in no manner dependent upon the debtor appearing and setting up such right prior to decree. *Taylor vs. Trulock*, 59 Iowa, 558.

None of these rights or exemptions of the bankrupt are affected by his bankruptcy, the same being reserved and preserved by Section 6 of the Bankruptcy Act.

The homestead character of the 40 acres in question is shown in the bankrupt's schedules, and in the alleged waiver of homestead right. It is conceded or admitted by the pleadings, and is established by the findings, conclusions and decree of the trial Court.

We submit it is clear that prior to June 11, 1908, the date of the bank's mortgage, the bankrupt held his homestead free and clear of all liens and incumbrances thereon, saving and excepting the Johnson mortgage. With respect to the Johnson mortgage, the bankrupt had the undoubted right to insist that Johnson should look to the 920 acres, not including the homestead, and should exhaust said 920 acres before coming upon the homestead for the payment of her mortgage. Over these rights and privileges of the bankrupt, Moody had no control, because his mortgage, though executed on March 23, 1908, did not, in legal effect, embrace the homestead.

Effect of Bank's Mortgage: When the bankrupt and his wife executed the bank's mortgage on their homestead, they thereby waived in favor of the bank, under the facts in this case, all these rights of exemption, and the bank had the right to subject the homestead to the payment of its debt. The bank, by taking the mortgage, became a purchaser from the bankrupt and his wife, and for valuable consideration, of their waiver of these rights in its favor. Having therefore received from the bank full consideration for their waiver of their homestead rights, in favor of the bank, they could not thereafter again waive those rights in favor of the trustees in bankruptcy, and thereby deprive the bank of the rights secured under its mortgage. Such subsequent waiver could only be made or received, subject to the rights created in favor of the bank by its mortgage.

To put it in other words, the mortgage to the bank was a sale, conditionally it is true, of the homestead to the bank, with the

right reserved on the part of the bankrupt to redeem from that sale, by making payment of the debt. That a mortgage is a conditional sale, subject to defeasance, is elementary. Inasmuch as the bank debt was not paid and discharged by the bankrupt, the subsequent bankruptcy practically and in legal effect converted the conditional sale of his homestead to the bank into an absolute sale.

It is true that a formal foreclosure, decree and sale, the expiration of the one year for redemption, allowed by the laws of Iowa, and a Sheriff's deed would be necessary to invest the purchaser at the Sheriff's foreclosure sale, or his assignee, with legal title to the land, but the homestead was incumbered for greatly more than it was worth, and the mortgagor was without any means. In practical effect, therefore, the conditional sale had become absolute.

We submit, therefore, that the bankrupt and his wife having sold their homestead, at first conditionally, and by reason of subsequent facts, such sale becoming practically unconditional, they had no right in the homestead which they could waive in favor of the trustees, and to the prejudice of the bank. Indeed, the only right the bankrupt had in his homestead, after executing the bank's mortgage, was to redeem from that mortgage, by paying the debt. The only possible right he could waive in favor of the trustees, would be this right of redemption, and they could not exercise it, nor could the Court empower them to exercise it, without first paying the bank debt, to the extent of the full value of the homestead.

The holding of the learned District Court, we respectfully submit, is somewhat of a shock to one's appreciation of right, equity and fair dealing. On June 11, 1908, the bankrupt was indebted to the bank in the sum of substantially $20,000.00 and to secure that indebtedness, which exceeded the value of the homestead, the bankrupt and his wife executed a mortgage upon their homestead. That mortgage was subject only to the Johnson mortgage. The bank, in taking the mortgage on the homestead, regarded the 960 acres covered by the Johnson mortgage as security, not only for the Johnson mortgage, but for its mortgage, in large part, at least, as well. After these facts had transpired, Hartzell became bankrupt, and thereafter he and his wife waived their homestead, in favor of the trustees, with the claimed result, that thereby the right of the bank to look to the full value of the homestead for payment of its debt, subject only to the Johnson mortgage, and without regard to the Moody mortgage, is destroyed and there is substituted in its stead, the right of the bank to look only to the balance of the proceeds of the home-

stead, for the payment of its debt, after the Johnson mortgage had been discharged in full, by the application on the Johnson mortgage of $5,052.63 of the proceeds of the homestead, when there were ample funds derived from non-homestead lands available to pay this mortgage in full, thereby increasing in said sum of $5,052.63 the amount to be applied on the Moody mortgage, so that, in its practical effect, the Moody mortgage, to the extent of $5,052.63, has been discharged out of the homestead or its proceeds, on which the Moody mortgage was not a lien.

We respectfully repeat that such a change in the status of the bank, with respect to its debt and the security therefor, brought about by the action of the bankrupt and his wife, without its knowledge and consent, is something that is not in keeping with one's idea of inherent right and equity. It cannot be the law, that a creditor's security can be swept away from him, either in whole or in part, by any such act or conduct on the part of his debtor, had or taken without his knowledge or consent.

Bank a purchaser: In support of this contention, we cite *In re Estate of Gill*, 79 Iowa, 296, wherein the court, in discussing the *status* of a mortgagee, used the following language:

> "Appellant's next contention is that, though Mr. Gill was a non-resident alien, yet that his mortgagees are not purchasers from him; that the term "purchasers", in section 2442, is used in the sense of "buyer" or one who has acquired title"; and that these mortgagees acquired no interest or title in the real estate mortgaged, and hence are not purchasers. The law recognizes but two ways of acquiring property,—by descent and by purchase. These mortgagees surely acquire property by their mortgages, and acquire it by purchase. While it may be said that they did not acquire title to the real estate, they certainly acquired an interest in it that they did not theretofore have. It is conceded that under the recording acts they are deemed purchasers."

The fact conceded above, that mortgagees are purchasers within the meaning of our recording acts, was held in *Central Trust Co. vs. Stepanek*, 138 Iowa, 131, and in *Boggs vs. Douglas*, 105 Iowa, 344.

Changes in homestead: With respect to the subject of making changes in the homestead, and the effect thereof, we call attention to Section 2981 of our Iowa Code, which is as follows:

> *Section 2981:* "*Changes.* The owner may, from time to time, change the limits of the homestead by changing the metes and bounds, as well as the record of the plat and description, or vacate it, *but such changes shall not prejudice conveyances or liens made or created previously thereto.**"

This section contemplates that the owners of homesteads may make changes with respect thereto, but specially declares that such changes shall be without prejudice to existing liens. This would surely be the law, even without statutory recognition thereof, and supports the argument we have made that the bankrupt could make no change in or with respect to his homestead to the prejudice of the bank's mortgage. If no change with respect to the homestead can prejudice an existing lien, if the substitution of one homestead for another does not affect the lien upon the former, then surely the abandonment or renouncement of a homestead cannot affect valid liens previously existing thereon.

Bank's status as against Moody: Having clearly in mind the bank's status with respect to the bankrupt and the Johnson mortgage, we turn our attention to its status as against Moody. We contend that as against Moody, the same status prevails, and that every right held by the bank, as against the bankrupt and the Johnson mortgage, is held by it also as against Moody. In other words, Moody, having no lien upon the homestead, cannot, in equity, question the relation of the bank thereto, notwithstanding the fact that he is a creditor of the bankrupt.

In yet other words, the bank under and because of its mortgage, steps into the shoes of the bankrupt, and can set up, as against Moody, each and every one of the rights, privileges, and exemptions hereinbefore discussed.

The learned District Court held directly to the contrary on this perhaps one of the pivotal points in the case. (Trans. page 20.) While we have already endeavored to show both on principle and because of our statutes, that the learned trial Court was in error in this finding of law, we now call attention to the decisions of our Supreme Court, which, we submit, put an end to the controversy.

IOWA DECISIONS. In *Linscott vs. Lamart*, 46 Iowa, 312, decided June, 15, 1877, the ultimate pertinent facts were as follows:

Ash was the owner of seventy-one acres of land, which included his homestead of forty acres. The plaintiff, Linscott, held a judgment against Ash which was a lien upon the non-homestead

thirty-one acres, but was not a lien upon the homestead forty acres. Lamart held a mortgage upon all the land.

In this situation Ash sold and conveyed the seventy-one acres to Lamart, neither party intending thereby that the mortgage should be canceled by the conveyance, but that all the land should continue to stand charged with the payment thereof.

The mortgage indebtedness not having been paid, Lamart instituted foreclosure as against the land, and prayed that the non-homestead thirty-one acres upon which Linscott had a judgment lien be first sold, before coming upon the homestead forty acres.

It will be seen that the cited case and the instant case are alike, in that Linscott in the cited case and Moody in the instant case, held a lien upon the non-homestead property. Lamart not only held a lien upon, but was then the owner of the homestead forty acres. Lamart had recourse not only upon the non-homestead thirty-one acres, but upon the homestead forty acres as well, while Linscott had recourse upon the non-homestead thirty-one acres only.

In disposing of the controversy thus arising between Linscott and Lamart, the Supreme Court of our State, per *Rothrock J.*, at page 314 of the opinion, in settling the rights of these two parties, made use of the following language:

> "Ash and his wife had the right to sell and convey the homestead to Lamart, and he (Lamart) *has the right to hold it exempt from judicial sale on plaintiff's judgment.*"

And on page 315 of the opinion, Subdivision 3, the court made use of the following language:

> "What then are the rights of the parties? If Ash had not conveyed to Lamart, upon foreclosure of the mortgage, the homestead could only 'be sold to supply the deficiency remaining after exhausting the other property' included in the mortgage. Lamart paid Ash some $1400 for the whole tract, being more than twice the amount of the mortgage. No fraud is charged or shown, and as he had the right to purchase the homestead and hold it as against plaintiff's judgment, he should now have the right to have the proceeds of the land, aside from the homestead, applied in payment of his mortgage, to the exclusion of junior liens. In other words, it would be inequitable to put him in a worse position than he would be if he had not taken the title from Ash. *The plaintiff, by this rule, is left in precisely the*

same position he would now occupy if Ash were still holding his homestead, and Lamart his mortgage."

This *Linscott* case is "on all fours" with the instant case, and covers it as "with a blanket." It was so regarded by the Circuit Court of Appeals, as shown in its original opinion of April 15, 1913, (Trans. page 30-32, 204. Fed. 963). In the *Linscott* case, the homesteader, Ash, and his wife, had parted with all interest in their homestead and non-homestead lands by conveying the same to Lamart, just as Hartzell and his wife conditionally conveyed all their interest in their homestead and non-homestead lands by the bank's mortgage, which mortgage, because of the subsequent events, has practically ripened into an outright conveyance. Linscott had a lien upon the non-homestead land, just as Moody & Son have a lien upon the non-homestead land in the instant case. The purchaser of the homestead, Lamart, was seeking to have the proceeds of the non-homestead land applied in payment of the mortgage debt, even as against Linscott, who held a lien upon the non-homestead land only. In the instant case the bank is seeking to appropriate the proceeds of the non-homestead land to the payment of the Johnson mortgage as against Moody & Son who hold a lien upon such non-homestead land. The Supreme Court of Iowa held that the purchaser from the homesteader stepped into the shoes of the homesteader and could insist upon the exempt character of the homestead tract of his grantor from sale until after subjecting the non-homestead land, precisely the same as the homesteader himself might have done if he had not parted with the title to his homestead. The Circuit Court of Appeals correctly held that the exempt character of the bankrupt's homestead forty acres passed to and could be enjoyed by the bank precisely the same as the bankrupt himself might have insisted upon it, if he had not given the mortgage to the bank and had not executed the waiver of homestead, and had been defendant in a suit to foreclose these respective mortgages.

This construction of our homestead statutes by the Supreme Court of this State, holding that the purchaser of the homestead from the homesteader can set up its exempt character as against creditors of the homesteader that the homesteader himself might have set up, was first made in *Alley vs. Bay*, 9 Iowa, 509, decided October 31, 1859. It has stood as the law of this State for fifty-six years, unchanged either by judicial or legislative action. It has become a well understood rule and hundreds of transactions have been based upon it. Being a construction of the statutes of our State, and not a judicial declaration of any common law

question, this court, in keeping with its oft repeated decisions, will adopt and enforce the same.

It seems to us that this *Linscott* case and the *Alley* case are so conclusive of the question now under discussion as that we might close this branch of the argument without further citation of Iowa decisions. We will, however, refer to some additional decisions of our Supreme Court.

We refer now to *Alley vs. Bay*, 9 Iowa, 509. In head note 4 is found the doctrine for which we contend, which doctrine is fully supported by the opinion. In that case, in an action to foreclose a senior mortgage not covering the homestead, because not concurred in by the wife, it was held that a party holding a junior mortgage upon the homestead, concurred in by the wife, could set up the invalidity of the senior mortgage, and this, too, *notwithstanding that the husband and wife made no defense in the action and failed and neglected to set up the homestead right.* Applying this cited case to the case at bar, Moody, in foreclosing his mortgage, senior in time, but not concurred in by the wife, as against the mortgage, junior in time, held by the bank, and concurred in by the wife, the bank is entitled to the benefit of the homestead exemption, notwithstanding that the bankrupt and his wife do not avail themselves of it.

We next cite *Bolton vs. Oberne, Hosick & Co.*, 79 Iowa, 278. The principle for which the bank contends is clearly enunciated in the opinion, beginning with the paragraph at the bottom of page 281. It was contended in the cited case that inasmuch as no member of the family was making any claim to the homestead exemption, no third party could set up such claim. This, however, was squarely denied in the opinion, and the holding is clear that though the husband and wife may neglect to set up the homestead exemption, nevertheless, any third person interested therein may do so. We ask the court to give this case careful perusal, as we think it fully supports our contention. We quote from the opinion as follows:

> "It being determined that the grantee was the daughter of Hazard Parks, his conveyance was invalid because of the homestead character of the premises and the failure of his wife to join in the deed. This conclusion is not seriously questioned by appellee, but he insists that appellants are not in position to take advantage of the invalidity: that in justice and equity *no one outside of the family or heirs* can disturb the title or take advantage of the deed: that all the heirs have treated the conveyance as

valid; and that no one else has a right to question its validity. Code, sec. 1990; *Alley v. Bay*, 9 Iowa, 509; *Barnet v. Mendenhall*, 42 Iowa, 296; *Belden v. Younger*, 76 Iowa, 567. Therefore, *any one interested* in the property it attempted to convey may question it."

We cite also *Redfield vs. Stocker*, 91 Iowa, 383, in which it was clearly held, though with respect to personal property, that the purchaser of exempt personal property has the right to set up against the claim of a creditor of the vendor, the exempt character of the property purchased, though the vendor and his wife may refuse to set up the exemption claimed. See second division of the opinion, beginning on page 385, the gist of the opinion being just below the middle of the page. We quote from the opinion as follows:

"At the time of the transaction in controversy, Robert Payne was a resident of this state, the head of a family and by occupation a farmer. He owned the harvester in question, and was entitled to hold it as property exempt from seizure under judicial process for the payment of his debts, but sold it to Redfield, who did not, however, take possession of it. After the sale, but while the machine remained in the actual possession of Payne, the defendant levied upon it an attachment, issued against the property of Payne. The plaintiff in this action pleaded and proved these facts, and claimed that the machine was not subject to the attachment, *but Payne remained silent as to whether he claimed the property as exempt*. We are asked to determine whether, on these facts, the plaintiff could defeat the levy by alleging and proving that the machine was exempt from execution in the hands of Payne, when the purchase was made. The certificate shows that the machine was in fact exempt from execution while owned by Payne, and that he sold it to Redfield. The sale carried all the rights which Payne had in the machine, *including the privilege of exemption from execution for the payment of his debts. Waugh v. Bridgeford*, 69 Iowa, 336, 28 N. W. Rep. 626. Having acquired these rights, Redfield was entitled to hold the machine exempt from seizure for the debts of Payne, and it was immaterial whether, after the sale was made, Payne claimed that the machine was exempt while he owned it or not. Redfield was entitled to

plead and show the facts upon which his rights were based."

We cite also *Waugh vs. Bridgeford,* 69 Iowa, 336, which is followed in the *Redfield case,* and wherein the same principle is recognized and cited.

Appellant's Contention: Moody, in his argument, presents this case as if all of the 960 acre tract was non-homestead in character, and without reference to the Iowa statutes pertinent to the discussion. From this, we dissent, and we submit:

First: In a foreclosure of the Johnson mortgage, against the mortgagor, and Moody, and the bank, the non-homestead land must first be sold, because such is the express provision of Sec. 2976 of our Code.

Second: The mortgagor, though permitting decree to pass against him by default, has the right and power, under Sec. 4032 of our Code, to insist upon the same procedure. Said section is so construed in *Taylor vs. Trulock,* 59 Iowa, 558, *supra.*

Third: The rights or the status of all the parties were fixed respectively upon the delivery and the receipt of their different mortgages, and could not thereafter be changed to the prejudice of one, and the advantage of another by the subsequent waiver of homestead.

Fourth: The mortgagor having received from the bank $20,000.00 for his homestead worth only $8,000.00, could not thereafter waive his homestead, or take any action with respect thereto to the bank's prejudice.

The real question: In other words, we respectfully submit, Moody fails to present the real legal question at issue. Under the Iowa Statute, said Sec. 2976, the mortgagor, by the Johnson mortgage, pledged his homestead for the payment of that mortgage *provided there was any deficiency remaining unpaid thereon after exhausting the non-homestead 920 acres.* While the Johnson mortgage, in form, covered the homestead, yet, as a matter of fact recourse could not be had to the homestead, except for a deficiency existing after exhausting the 920 acres. Inasmuch as the 920 acres sold for much more than enough to pay the Johnson mortgage in full, then really and in legal contemplation, and effect, Johnson had no mortgage upon the homestead at all. This being true, Hartzell was at liberty to deal with his homestead at his pleasure. Again, and because it was exempt property, he could dispose of it at will, without regard to his creditors, including Moody, who had no lien thereon or interest therein.

In this situation, Moody took his mortgage upon the non-homestead lands *only*, charged with full knowledge that, under his said mortgage, he could receive *only* the balance of the proceeds of the sale of the non-homestead land. Neither the Johnson mortgage nor the Moody mortgage could deprive Hartzell of his right to have the proceeds of his non-homestead land applied *first*, to the payment of the Johnson mortgage in full, and *second*, the remainder of such proceeds applied upon the Moody mortgage.

Notwithstanding the execution of the Johnson mortgage and of the Moody mortgage, Hartzell had the right to do what he pleased with the homestead 40 acres,—to sell it or mortgage it, without reference to said two mortgages. The homestead and all of its proceeds belonged, under the facts in this case, to Hartzell, *absolutely*.

In this situation, Hartzell mortgaged his homestead to the bank for more than twice its full value, paid in cash to him. In legal effect, and because of his ensuing bankruptcy, this was a conveyance of the homestead to the bank, for much more than full value of the property, absolutely owned by Hartzell, against which neither the Johnson nor the Moody mortgage constituted any lien. The Johnson mortgage would have been a lien upon the homestead, if the non-homestead property had not sold for sufficient to pay the same in full, thus leaving a deficiency to be discharged, for which the homestead might be sold, but there was no deficiency.

In yet other words, the Johnson mortgage was a first lien upon the non-homestead 920 acres, and was an apparent, but contingent lien upon the homestead, the contingency being the existence of a deficiency after exhausting the non-homestead 920 acres. Since, however, that contingency did not arise, then the Johnson mortgage, in fact and legal effect, never constituted a lien upon the homestead. In reality, and under the facts of this case Johnson had a first lien upon the non-homestead 920 acres only. Moody had a second lien upon said 920 acres only. The bank had the first and only actual lien upon the homestead 40 acres. Nevertheless, Moody asks that the bank be deprived of more than five-eighths (5/8) of its security, which was really the first and only mortgage upon the homestead, and insists that the same be turned over nominally to Johnson, but, in fact, directly to him, though he had no lien of any kind thereon or interest therein.

Homestead lost to bankrupt: Moody insinuates that the favors of exemption shown the owner of a homestead, are of no moment in the present case, saying, in effect, that so far as the bankrupt is concerned his homestead is taken, either under the Johnson mortgage or under the bank's mortgage and that Hartzell thereby is

deprived of same. We submit this argument is fallacious. It was not and could not be taken under the Johnson mortgage, because the non-homestead 920 acres sold for more than enough to pay said mortgage. It will be taken under the bank's mortgage, but that does not deprive the bankrupt of his homestead, in the sense suggested by Moody. If it were taken by the bank and nothing had been given in return, then the bankrupt would be deprived of his homestead, as argued by Moody. The fact is, the bankrupt has received from the bank $20,000.00, in return for his homestead worth but $8,000.00. He could not mortgage or sell his homestead to the bank, and enjoy the fruits of such disposition of it, and keep it, at the same time. The old maxim that one cannot eat his cake and continue to have it, fits this situation.

When Hartzell gave the Johnson mortgage, Johnson had the right to look only to the non-homestead 920 acres for the payment of her mortgage, except in the contingency that the same did not yield sufficient so to do. When Moody took his mortgage, next in time, not covering the homestead, he simply had the right to take the remainder of the proceeds of the non-homestead property, after paying the Johnson mortgage, if there were any such remaining, as in this case there proved to be. When the bank took its mortgage, it had the right to look to the remainder of the proceeds of the non-homestead property, after paying the Johnson mortgage and the Moody mortgage in full. There being no such remainder, the bank has no interest in the proceeds of the non-homestead land.

But the bank has the right to look to the proceeds of the homestead to apply upon its mortgage, for the reason that Johnson could not touch it, having been paid in full, and Moody could not reach it, having no mortgage thereon. The decree of the District Court deprives the bank of this, which to us seems to be an undoubted right. The learned District Court, we respectfully submit, fell into error, when it held that the subsequent waiver of the homestead robbed the homestead 40 acres of its former homestead character, not only as against the bankrupt, but against the bank as well. (See Transcript, page 20, par. 5.) Having fallen into this error and pursuing it to the end the result reached, was also erroneous. This error was corrected by the reversing decree of the Court of Appeals.

Suppose no mortgage had ever been made to the bank. Could Moody then in any way reach the homestead? Clearly not. Said Section 2976 stands, an impassible barrier, in his way. Why, then, should the making of the mortgage to the bank enlarge Moody's rights and allow him to indirectly appropriate the pro-

ceeds of the sale of the homestead to his debt? The mortgage to the bank clearly does not and could not prejudice his rights. On the other hand it is equally clear that the mortgage to the bank could not enlarge or enhance his rights. We submit further, that the authorities cited by us in support of our proposition, that because of our mortgage we have the right to set up every claim which the bankrupt himself might set up, fully sustain our contention, notwithstanding the criticism made thereof by Moody in argument.

Argument of Proposition Eight.

The waiver of homestead, whatsoever the motive impelling its execution, and howsoever intended, *is by its very terms,* inoperative as against the bank. It was executed October 14, 1908. Nearly eleven weeks previously, and on August 1, 1908, Hartzell had been adjudicated a voluntary bankrupt, and at that time, and up to October 14, 1908, claimed his homestead exemptions. Something over four months previously, on June 11, 1908, he and his wife had executed the bank's mortgage upon the homestead, which was the second mortgage thereon, and junior to the first mortgage to Johnson, executed a number of years previously. Under these circumstances, he and his wife voluntarily executed the waiver, wherein after his former claim of homestead contained in his voluntary petition and schedules, they waive "any and all homestead right, title, claim, and interest *we have* in said above described real estate, *or had at the time of the institution of proceedings in bankruptcy.*" (Trans. pages 1 and 2.)

The words *"we have"* found in the waiver, are in the present tense, and are equivalent to "we *now* have" or "we *at this time* have"; and necessarily refer to the day of the date of the instrument, to wit: October 14, 1908. If the instrument was not delivered until the day it was filed, to wit: October 17, 1908, then these words refer to that date, for the waiver was of no force or effect, as against anybody, until delivered, and "speaks" only from that date.

The words *"or had at the time of the institution of proceedings in bankruptcy"*, are in the past tense, and necessarily refer to August 1, 1908.

But it clearly appears that from and after June 11, 1908, the date of the bank mortgage, the only right Hartzell and his wife had in their homestead was to redeem same upon payment of said mortgage and this is the only right that passed to the Trustees under the waiver. The Trustees having sold the homestead under

the order of the court, the full proceeds thereof, amounting to about forty per cent (40%) of the bank's mortgage, should have been applied thereon.

It will be observed that the bank's consent to the sale was given, reserving all its rights as to the proceeds of the homestead, and upon the proviso that its mortgage lien should be impressed upon said proceeds. (Trans. pages 10 and 11, paragraphs 12 and 13.) The order of the court directing the sale clearly contained such provision, (Trans. page 13), and the bank's mortgage lien was unequivocally recognized by the honorable trial Court in its Findings of Fact. (Trans. page 17, par. 10.)

Argument of Proposition Nine.

This proposition has to do with the pertinency or applicability of the doctrine of "marshalling assets" in the present case. This doctrine is based upon the broad, general, equitable proposition that where there are two creditors of a common debtor, and the one creditor has the right to come upon two funds for the payment of his debt, and the other creditor has the right to look to but one of the funds for the payment of his debt, the former creditor will be directed to exhaust the fund not available to the latter creditor, before coming upon the other fund. But coupled with this principle, is another equally equitable, that this rule will never be applied except it can be done without prejudice to said former creditor.

The equitable maxim, that *"Equity regards the substance, not the form,"* is too well settled and elementary to justify cumbering this brief with many citations in its support, and we content ourselves with the reference, *supra*, to 11 Am. & Eng. Enc. of Law. (2nd. Ed.) 184, and the cases cited in the foot notes.

The 960 acres of land had been sold, and the proceeds thereof were before the honorable District Court, for distribution.

As to the non-homestead 920 acres, the several mortgages took precedence in the following order, 1st, the Johnson mortgage, 2nd, the Moody mortgage, 3rd, the Century Savings Bank mortgage. But the non-homestead proceeds were wholly insufficient to pay, in full, the Johnson and Moody mortgages. There was no fund, the proceeds of the non-homestead lands, remaining, upon which the bank had any lien. In form, it had such lien; in substance, there was no fund to which its lien could attach.

The only security the bank had, was the proceeds of the homestead 40 acres, upon which it had a mortgage, junior only to the Johnson mortgage. Aside from the Iowa statute requiring such course as between the Johnson mortgage and the bank mortgage,

the doctrine of marshaling assets required Johnson to first exhaust non-homestead lands, the proceeds of which were amply sufficient to pay her claim in full, without resort to the homestead proceeds.

As between Moody and the bank Moody had a second mortgage, only on the proceeds of the non-homestead lands, and the bank had a second mortgage only on the proceeds of the homestead. There were no two funds in fact to which the bank could resort for payment of the mortgage.

The authorities discuss together the subjects of the necessity for two or more funds to be available to the same creditor, to justify the application of the principle of marshaling assets, and the doctrine that such marshaling of assets shall not prejudice the creditor against whom the marshaling is sought.

In Story's Eq. Jur., (12 Ed.) Sec. 560, it is said:

> "But, although the rule is so general, yet it is not to be understood without some qualifications. It is never applied except where it can be done *without injustice to the creditor*, or other party in interest, having title to the double fund."

And in *Pomeroy's Eq. Jur.*, Vol. 4, (1905 Ed.) Sec. 1414, (which see, and cases cited in notes 3, 4, and 5), it is said:

> "These rules must be taken with the modifications and exceptions that in their application the paramount encumbrancer shall not be delayed or inconvenienced in the collection of his debt, for it would be unreasonable that he should suffer because some one else has taken imperfect security; *that the rights of third parties shall not be prejudiced*, and that the parties themselves are creditors of the same debtor."

In *Evertson vs. Booth*, 19 John. 485, the doctrine of marshaling securities was under examination, and with respect thereto, the court, beginning near the bottom of page 492, uses the following language:

> "I yield my entire assent to the proposition, that where a party has two funds, out of which he can satisfy his debt, and another creditor has a lien, posterior in point of time, on one of the funds only, the first creditor will, in equity, be compelled to resort to that fund the junior creditor cannot touch, in order that the junior creditor may

> avail himself of his only security, *where it can be done without injustice or injury to the debtor or creditor.*" * * * But a Court of Equity will take care not to give the junior creditor this relief, if it will endanger thereby the prior creditor, or in the least impair his prior right to raise his debt out of both funds. The utmost that equity enjoins, in such a case, is that the creditor who has a prior right to two funds, shall first exhaust that to which the junior creditor cannot resort; but where there exists any doubt of sufficiency of that fund or even where the prior creditor is not willing to run the hazard of getting payment out of that fund, I know of no principle of equity which can take from him any part of his security, until he is completely satisfied."

In *In re assignment of Hobson*, 81 Iowa, 392 at page 398, in the opinion, the following language is found:

> "The general principle in regard to marshaling securities is stated as follows: 'If one party has a lien on or interest in two funds for a debt, and another party has a lien on or interest in one only of the funds for another debt, the latter has a right in equity to compel the former to resort to the other fund in the first instance for satisfaction, if that course is necessary for the satisfaction of the claims of both parties, *whenever it will not trench upon the rights or operate to the prejudice of the party entitled to the double fund.*' 1 Story Eq. Jur., Sec. 633. Although the rule is well established it will not be applied where it would work an injustice. *Dickson v. Chorn*, 6 Iowa, 20; 1 Story Eq. Jur., Sec. 560."

The principle underlying the decision in *Cutler v. Ammon*, 65 Iowa, 281, as announced in Division 2 of the opinion is pertinent to the case at bar. The contest therein arose between the plaintiff, seeking to enforce a vendor's lien, and certain of the defendants, who were judgment creditors of the vendee. Plaintiff claimed that creditors had recourse to a second fund, whereas he had recourse to but one, the land, and that in such case the creditors should first exhaust the second fund to which the plaintiff could not resort. The second fund was not in court and could only be accumulated as the result of litigation. In passing upon the controversy, the court, near the bottom of page 284, used the following language:

"If then we should sustain the plaintiff, we should remit these judgment creditors to what, at best, would be but the chances of litigation, involving a question of personal responsibility, as well as of superior equities. The person who has a claim upon two funds as security cannot be required to exhaust one in preference to the other, *except where it can be done without injustice to him. Clark v. Bancroft,* 13 Iowa, 320."

In *Wolf v. Smith, et al.,* 36 Iowa, 454, one creditor was invoking the doctrine of marshaling of securities against another. The creditor against whom the doctrine was invoked held for security a mortgage upon certain land; and, in addition thereto certain notes deposited as collateral. The other creditor who had recourse to the land alone, insisted that the doubly secured creditor should first exhaust the collateral notes before resorting to the land. The court declined to so order, in the third division of the opinion at page 456, using the following language:

"At the time of the sale of the note to plaintiff, and as collateral security therefor, Graham left with Wolfe nine promissory notes, executed by six different parties, and varying in amount from $150 to $400, and amounting in all, with accrued interest to $3,043.34. On behalf of Long it is claimed that he is entitled to have these collaterals exhausted, before resort can be had to the mortgaged property for the payment of any portion of appellant's claim. The doctrine is elementary that if a creditor has two funds to which he may resort for the discharge of his debts, he shall take his satisfaction out of that fund, upon which another creditor has no lien. 1 Story's Equity Jurisprudence, Sec. 559, and cases cited. But this rule is subject to an important qualification: *'It is never applied except where it can be done without injustice to the creditor.'* Id., Sec. 560 and 633, and cases cited. Now it seems clear to us that plaintiff could not be required to resort to these collaterals without great prejudice to his interests and undue control of his remedies. A very small portion of the sum represented by these notes was due at the commencement of the foreclosure suit. It does not appear that the makers are responsible. If the plaintiff should be compelled to proceed against them he would be involved in a multiplicity of suits, and in the end he would have only general judgments, and no specific liens."

A similar claim was set up in *Clark v. Bancroft*, 13 Iowa, 320, and a similar result was reached. The court again declined to order the creditor to resort first to his collateral notes before seeking to foreclose his mortgage, as will appear from the following language quoted from the opinion, beginning near the bottom of page 326:

> "We do not think from the terms of the mortgage, that this fund was placed in the hands of complainant as a security for the purchase-money. The mortgage was the security, and the notes were assigned for the purpose of enabling the plaintiff to collect them, and when collected, the proceeds to be applied in liquidation of the purchase money. We will concede the rule in equity to be that where there exists two or more funds, and there are several claimants against them, and at law one of the parties may resort to either fund, but the other can come upon one only, that in such a case, a court of equity can exercise the authority to marshal the funds, and by this means enable the parties whose remedy at law is confined to one fund only, to receive due satisfaction. Courts of equity interfere in such cases, to prevent the power held by the party who controls the double fund from being made an instrument of caprice, injustice or imposition. But, although this rule is so general, it is not to be understood without some qualification. *It is never applied except where it can be done without injustice to the creditor.*"

For further support of our contention on this question, we cite *Dickson v. Chorn*, 6 Iowa, 19. We content ourselves by quoting the following language from the opinion beginning near the bottom of page 32:

> "This is not a case where a party has a right to marshal assets or securities. It is true that the general rule is, that if a creditor has two funds out of which he may make his debts, he may be required to resort to that fund upon which another creditor has no lien. Story's Eq. Jur., Sec. 559. And yet we are not to take this rule without some qualifications. For instance, it is never applied, *unless it can be done without injustice to the creditor*, or other party in interest, having a title to the double fund, and also without injustice to the common debtor. Id., Secs. 560, 642."

The doctrine of *Dickson v. Chorn, supra,* is also announced in *McArthur v. Martin,* 23 Minn. 74, and in *Marr v. Lewis,* 31 Ark. 203, (25 Am. 553).

In *Walker v. Covar,* 2 S. Car. 16, the court, at page 19 of the opinion, said:

> "Subject to some qualification to be hereafter referred to, it may be admitted, as a rule of the Courts of Equity, that, if a creditor holds double securities, he shall take his satisfaction out of the one upon which another creditor has no lien. * * * Story's Eq. Jur., Secs. 559, 560. It is, however, never applied except where it can be done *without injustice to the creditor* or other party in interest having a title to the double fund, and without injustice to the common debtor. Ib. 560. A doctrine based strictly upon principles of equity should not be enforced when it would result to the prejudice of one who, with at least as high an equity, has also a legal right which it is sought to delay. * * * Such a relief as is here asked is never granted, if the prior creditor is thereby endangered, or his right to raise the money out of both funds the least impaired. *Everton v. Booth,* 19 Johns, 493; *Evans v. Duncan,* 6 Watts, 24; *Ramsay's Appeal,* 2 Watts, 220. Or when the fund to be resorted to is dubious, or one which may involve him in litigation notwithstanding the claims of a junior creditor may be defeated thereby. *Fowler v. Barksdale, Harp.* Eq., 165; *Goodwin v. The State Bank,* 4 Des., 393; *Moore v. Wright,* 14 Rich. Eq., 134."

In *Briggs vs. The Bank,* 1 Freeman, (Miss.) 574, the court at page 584, said:

> "A court of equity never compels a party having a prior lien upon the two funds to resort to one only, in order that a junior lien may be satisfied out of the other, unless it appears that the one which is not affected by the junior lien is *fully adequate* to the satisfaction of the prior lien, and that the remedy reaching it is prompt and efficient. 1 Story's Eq., 528. The fund to which the complainants would cause the bank to resort is one depending upon the contingencies of a law suit."

In *Emmons v. Bradley,* 56 Me. 333, it is said at page 338 of opinion:

> "But there is no law by which a creditor, holding security upon different kinds of property, can be compelled to select that which is least convenient and available to himself in order to aid other creditors, not secured, in the collection of their demands. Such a claim was urged and denied in *Lupton v. Cutter and Trs.*, 8 Pick. 555, and *Tucker v. Clisby and Trs.*, 12 Pick. 22."

In *Herriman v. Skillman*, 33 Barb. 378, at top of page 384 it is said:

> "The rule (of marshaling securities), however, is subject to some qualification. Such a course * * * must not operate *to prejudice the rights of the first creditor to the double fund: Neither must there be any reasonable doubt of the sufficiency of the one fund to satisfy his debt.* Speaking of the relief to which a junior creditor will be entitled, under such circumstances, Chief Justice Spencer, in *Everton v. Booth*, 19 Johns, 486, says: (Here the court quotes the language set out in our extract from said case, *supra.*)"

In *Sweet v. Redhead*, 76 Illinois, 374, the court, at page 377 of the opinion, said:

> "Now, this rule of compelling a final resort to a particular one of two funds for the creditor's benefit who can reach but one of them, will not be enforced *whenever it will trench upon the rights, or operate to the prejudice* of the party entitled to the double fund. 1 Story Eq. Jur., Sec. 633. As it was said by Mr. Justice Sergeant, in the case of *Zeigler v. Long*, 2 Watts, 206, in reference to this doctrine: 'This principle must be employed, like all other rules of equity, to the attainment of justice. It is not to overthrow the equity of another person, and thus work injustice.' And see *Barnum's Appeal*, 7 Watts & Serg. 269; 2 Lead. Cas. in Equity, 278, 281."

We respectfully direct attention to *In re Bailey*, 176 Fed. Rep. 990, which we regard as in part on "all fours" with the instant case, with reference to the principle of "marshaling assets" where a homestead exemption is involved. In the *Bailey case*, certain creditors were claiming that the mortgagee of the bankrupt's homestead should first exhaust the homestead in payment of the

mortgage debt, before coming upon the general fund, basing their claim upon the doctrine of "marshaling assets." This, the court, in a well reasoned opinion, and citing many authorities, denied. Some conflicting authorities were commented upon and shown to be criticised or overruled by the authorities relied upon by the court. The peculiar pertinency of the opinion becomes apparent from the following extract therefrom:

> "But it is argued that the equitable principle of marshaling is applicable; that the mortgage creditors had a right to resort to two funds for a satisfaction of their claim, while the general creditors are restricted to the one, and hence, the former will either be required to first exhaust the fund applicable to their debt alone before resorting to the other; or, the general creditors will be subrogated to their right as to such fund. The rule of marshaling rests on equitable principles and will only be applied when equitable, *and never to the disadvantage of a holder of an equal equity*. So it has been held that "where judgment is recovered against two codefendants, and execution thereon is levied upon the property of one of them and the other is adjudged bankrupt, the judgment creditor may prove his claim against the bankrupt as unsecured." (*In re Headley*, (D. C.) 97 Fed. 765); and also "In a proceeding in bankruptcy, a creditor of a firm, holding security upon the separate property of one of the partners, may prove his entire claim against the joint estate without releasing his security, though the member whose individual assets constitutes the security, owes no individual debts," (*In re Thomas*, Fed. Cas. No. 13,886); and to the same effect are *Ex parte Whiting*, Fed. Cas. No. 17,573, *Case of Howard*, Fed. Cas. No. 6,750; *In re Holbrook*, Fed. Cas. No. 6, 588; *Case of Plummer*, 1 Phil. Ch. 56. Here, I think the estates are to be considered as different. In the ordinary case where the creditor with a right to one fund insists on the marshaling of the securities of the creditor who can resort to two, the creditor so seeking a marshaling has a superior equity to the debtor; BUT NOT SO AS TO A HOMESTEAD EXEMPTION. The Legislature, in providing for this exemption, has formulated as a rule of public policy the superiority of right of a debtor to the exempt property over that of his creditors to the payment of their debts. It has said that it is more important that the debtor be not entirely stripped of his property

than that his creditors be paid. So that, as to such property, it cannot be said that the general creditor has a superior equity. Many state courts have refused to marshal securities under these circumstances. *Mitchelson v. Smith*, 28 Neb. 583, 44 N. W. 871, 26 Am. St. Rep. 357; *Colby v. Crocker*, 17 Kan. 529; *LaRue v. Gilbert*, 18 Kan. 220; *McLaughlin v. Hart*, 46 Cal. 638; *Wise v. Williams*, 88 Cal. 30, 25 Pac. 1064. The case of *Colby v. Crocker*, *supra*, was cited with approval by the circuit Court of Appeals of this circuit in *Re Nye*, 133 Fed. 33, 36, 66 C. C. A. 139, and, in fact, that decision seems to rest on the same principle."

A mortgagee for value of a homestead has acquired all of the rights of the mortgagor to his homestead exemption, and stands in his shoes with respect thereto.

Prejudice to the bank: Now with this fundamental qualification of the rule in mind, it only remains to inquire whether the bank was prejudiced by failure on the part of the learned District Court to observe it.

That the bank was thereby prejudiced to the extent of $5,052.63, is so obvious as scarcely to need further mention. If no marshaling of securities had been made the bank would have received the full proceeds of the homestead, to wit: $8,000.00. Out of that sum, it has received $2,947.37 only. The remainder of $5,052.63, has been applied upon the Johnson mortgage. The practical result is that the bank has been thus deprived of $5,052.63.

In other words, out of the proceeds of the homestead, to wit: $8,000.00, upon which the bank had a mortgage lien, the sum of $5,052.63 has been deducted, leaving the bank with an unpaid balance on its mortgage of substantially $15,000.00, and said sum so deducted, has been, in effect, turned over to Moody, who had no lien of any kind thereon, or equity therein.

We respectfully submit a more flagrant instance of erroneous application of the doctrine of marshaling is difficult to imagine. Instead of resulting in equity to Moody, without prejudice to the bank it simply extracts $5,052.63 from the treasury of the bank to whom it rightfully belongs, and hands it over to Moody, who has no right thereto at all.

The balance on hand in the hands of the Trustees, to wit: $13,683.94 (Trans. 18) should have been distributed as follows: To the bank, $8,000.00, and to Moody, the remainder, or $5,683.94. Instead of this, the District Court distributed said fund as follows: To the bank, $2,947.37, and to Moody, $10,736.57. We

respectfully, but earnestly insist that the distribution made by the District Court was erroneous, and to the serious prejudice of the bank in the sum of $5,052.63.

As already suggested in note 2 hereinbefore, the reversal of the decree of the District Court, with instructions to turn over to the bank the proceeds of the homestead, to wit: $8,000.00, and to turn the then remainder over to Moody, removed the prejudice to the bank, and permitted all the parties to enjoy their full rights and equities in the case.

Review of Appellant's Argument.

In the statement of facts at the bottom of page 2, it is said that the Century Savings Bank is the holder of a third mortgage. This is not true. It held a first mortgage in legal effect upon the homestead, though in form only it was second to the Johnson mortgage.

The only property in dispute here is the proceeds of the homestead. The bank held a second mortgage upon the homestead and its proceeds. Moody & Son had no mortgage thereupon. The question is, whether the holder of the second mortgage shall be deprived of its security for the benefit of a third party who has no interest whatever in such proceeds.

And again, beginning near the bottom of page 15 of his argument, Moody says: "There is no controversy between the attorneys for the appellant and appellee that the rule adopted by the district court was the correct one in the absence of Section 2976 of the Code of Iowa of 1897." This also is incorrect. While it is true we count largely upon the provisions of the Iowa statutes for affirmance of the judgment and decree of the Circuit Court of Appeals, nevertheless aside from and without the Iowa statutes, we submit Moody is not entitled to the relief he asks. Even at common law and under the equitable doctrine of marshalling securities, Moody must fail because there are not two funds in fact upon which the bank can come for the payment of its mortgage. After it is allowed all the proceeds of the homestead, $8,000, and then looks to the proceeds of the non-homestead property, it finds that all the proceeds of the non-homestead property have been appropriated by Moody to the payment of his mortgage. Because the bank cannot look to two funds, there is no ground in favor of Moody for marshalling securities as prayed by him.

Again, as shown in the authorities hereinbefore recited, the creditor who has recourse to two funds cannot be held to resort to one alone for the benefit of a co-creditor, unless that one to which he is compelled to resort will pay in full his claim. In this case,

after the bank receives the whole of the proceeds of the homestead, $8,000, it has an unpaid balance on its debt of substantially $12,000. We repeat that the effect of the judgment of the District Court, happily reversed in the Court of Appeals, is that the fund of $8,000, which, under the authorities, should all be applied *pro tanto* to the debt of the bank, has been reduced to the sum of $2947.37, and the remainder of the $8,000 wrongfully taken from the bank and handed over to Moody.

If the proceeds of the homestead would pay the claim of the bank in full and leave a remainder, Moody could not reach that remainder except by virtue of the waiver of the homestead made by the bankrupt and his wife. But for that waiver said remainder would be handed over to the bankrupt. Because of that waiver, said remainder might be turned over to Moody, but no part of the proceeds of the homestead could be handed to Moody until the claim of the bank was first paid in full.

It is also contended, at page 16 of argument by Moody that "it is the contention of the appellee, and sustained by the Court of Appeals, that this statute, (Sec. 2976), abrogates and sets aside the equitable rules for marshalling assets." This is not strictly correct. The bank makes no such contention. As shown just above, the bank contends that under the common law principles of marshalling securities, Moody is not entitled to relief. Because also of the Iowa statutes, another obstacle to granting him the relief prayed by him is created.

And on the same page 16 it is stated by Moody that "the precise question involved here has never been determined by the court of last resort in Iowa, so that it is one for the independent judgment of the federal court." This, we submit, also is not correct. The precise question presented here was determined by the Supreme Court of Iowa nearly sixty years ago in the *Alley* case, and thereafter followed in the cases hereinbefore cited, and commented upon by us.

Moody's argument that the homestead right is personal, and cannot be sold or conveyed for full consideration, is controverted by daily transactions. It is a common thing for a man owning a homestead, against whom judgments have been rendered, to sell and dispose of his homestead. In every such case the grantee, relying with assurance upon the settled law of this State, and standing so settled for nearly sixty years, purchases the homestead and pays his grantor therefor. If these old judgments against the grantor could be asserted against the homestead in the hands of the grantee the result would be that no one would purchase a homestead from an

insolvent grantor. This would deprive the former owner of availing himself of his homestead right.

The former owner may invest the proceeds of his old homestead in a new one and continue to hold the new one exempt as he did the old. This does not affect his creditors, because they at no time could reach his homestead, either in its original form or in the one purchased with the proceeds of the original homestead. How a man who is an Iowa lawyer, and has been an Iowa judge, could go so far astray on the well known and long settled construction of the Iowa law pertaining to homesteads, and their transferability, and their continued exempt character as against creditors of the grantor, in the hands of the grantee, is something that we cannot comprehend. (Code of Iowa, (1897) Section 2981.)

Appellant openly quarrels with the Circuit Court of Appeals in the construction by that court of the Wisconsin cases. The Circuit Court of Appeals regarded even the Wisconsin cases as overthrowing Moody's contention. That court adhered to its opinion and reasserted it upon full second consideration, in its supplemental opinion, specially concurred in by his honor, WALTER I. SMITH, *Circuit Judge*. Is it not remarkable that a lawyer should journey from Canadian, Texas, accompanied by another from St. Louis, Missouri, and by yet another from Des Moines, Iowa, to Wisconsin, to discover the construction of an Iowa statute, which construction has been standing from its original announcement, nearly sixty years ago, frequently followed since, and could be found by reference to the Iowa reports in any office of any Iowa lawyer. Evidently they are all affected with the assumed but unfounded truth of the old adage, "Green fields far away."

Moody seems to place reliance upon *Dilger vs. Parmer*, 60 Iowa, 117, and thinks it affords him support. In that case a man gave a mortgage covering his homestead and non-homestead property. Thereafter, for full consideration received by him, he sold and conveyed the non-homestead property. The mortgage not having been paid, foreclosure was instituted by the holder thereof. The mortgagor insisted that his former non-homestead property, for which he had full value in his pocket, should be sold before recourse was had to his homestead. In other words, the mortgagor was insisting that property *which did not belong to him* should be sold to pay his debt before coming upon his homestead. He had the effrontery to come into a court of equity and ask that court to aid him in filching from his grantee the property he had sold his grantee for full value by him received. Is it any wonder that the Supreme Court of Iowa denied his request and taught him a lesson in common honesty, and held that since he had sold the non-

homestead property and had the value of it in his pocket, he could not ask that the same be appropriated to the payment of the mortgage in advance of recourse to the homestead?

Furthermore, the mortgagor in the *"Dilger"* case knew when he gave the mortgage he had the right to insist that his non-homestead property be first applied to its payment. When he sold that non-homestead property and received the proceeds thereof, how could he longer insist that it should first respond to the payment of the mortgage? The morals of the ordinary highwayman seem to be upon the same plane as those of the mortgagor in the *"Dilger"* case.

SUBMISSION.

In conclusion we submit that the judgment and decree of the Circuit Court of Appeals should be affirmed, for each and all of the reasons hereinbefore enumerated, and which are now recapitulated as follows:

DIVISION 1.

JURISDICTION OF SUPREME COURT.

Moody & Son are not entitled to a review in this Court of the correctness of the order of the Circuit Court of Appeals overruling their motion to dismiss our appeal to that Court from the District Court, because they did not prosecute their appeal to this Court within the time prescribed by Order 36 of "General Orders in Bankruptcy." (Proposition 1 and argument thereof.)

Moody & Son are not entitled to a review on the merits in this Court, because the judgment of the Circuit Court of Appeals on the merits is final. (Proposition 2 and argument thereof.)

DIVISION 2.

JURISDICTION OF CIRCUIT COURT OF APPEALS (AND OF SUPREME COURT.)

The bank's right of appeal from the District Court to the Circuit Court of Appeals is allowed by the Court of Appeals Act of March 3, 1891; by Section 24-a of the Bankruptcy Act of 1898; and by Section 25-a (3) of said Act. The motion of Moody & Son to dismiss our said appeal was therefore correctly denied. (Propositions 3, 4, 5 and 6 and argument thereof.)

DIVISION 3.

THE MERITS.

The bankrupt's waiver of homestead in this case is without importance and cuts no figure therein. (Proposition 7, points 1, 2, 3, 4 and 5, and Proposition 8, and argument thereof.)

The bank, by its mortgage, steps into the shoes of the bankrupt and has the same right to insist upon the exempt character of the homestead that the bankrupt himself formerly enjoyed. (Proposition 7, point 6, and argument thereof.)

The securities in this case cannot be marshalled, as prayed by Moody, because thereby the rights of the bank are prejudiced; and because the whole of the proceeds of the homestead are insufficient to discharge the bank's mortgage; and because the bank in fact does not have two funds to which it may look for the payment of its mortgage. (Proposition 9 and the argument thereof.)

Respectfully submitted,

DALE & HARVISON,
Per HARVISON,
Solicitors for Century Savings Bank, Respondent.

The true and actual cost of printing the foregoing is the sum of $----------.

Solicitors for Century Savings Bank, Respondent.

ROBERT MOODY & SON *v.* CENTURY SAVINGS BANK.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 70. Argued November 10, 11, 1915.—Decided December 13, 1915.

A petition filed by a trustee in bankruptcy in the bankruptcy proceeding, asserting title to lands of the bankrupt reciting encumbrances thereon and asking that they be sold, the assets marshaled, and all persons claiming liens be made parties, gives rise to a controversy in bankruptcy proceedings, the decision in which may be reviewed by the Circuit Court of Appeals under § 24a of the Bankruptcy Act and § 128, Judicial Code.

Although such a proceeding is commenced by the trustee, the appearance of holders of mortgage liens asserting their rights and seeking to have them enforced conformably to their contentions, is equivalent to affirmative intervention and brings a controversy quite apart from ordinary steps in bankruptcy.

Homestead rights in land are creations of the States in which the lands are situated, and the validity and operation of mortgages thereon are determined by the statutes of the State in which the homestead is situated, as construed and applied by the courts of that State.

Under the laws of Iowa, as construed by the courts of that State, a homestead, even when validly mortgaged, may be sold only for a deficiency remaining after exhausting all other property covered by the same mortgage.

The right to insist on the exemption of a homestead in Iowa from sale except for deficiency is not personal to the mortgagor, but may be asserted by anyone to whom the homestead owners may have transferred an interest; nor can they after such transfer prejudice the transferee in the exercise of this right.

204 Fed. Rep. 963.

THE facts, which involve the jurisdiction of this court of appeals from judgments of the Circuit Court of Appeals, in a bankruptcy proceeding and the marshaling of proceeds of sale of homestead property in Iowa, are stated in the opinion.

Mr. S. F. Prouty, with whom *Mr. George F. Haid* and *Mr. Newton P. Willis* were on the brief, for appellants.

Mr. W. G. Harvison, with whom *Mr. Horatio F. Dale* was on the brief, for appellee.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

The facts bearing upon the questions presented by this appeal are these: On his voluntary petition Oscar M. Hartzell, a resident of Madison County, Iowa, was adjudged a bankrupt. He owned 960 acres of land in that county, 40 acres of which he and his family had been and were occupying as a homestead. Three mortgages in terms covering all the land had been given by him—the first to Emma Johnson, the second to Moody & Son, and the third to the Century Savings Bank. His wife had joined in the first and third, but not in the second. After he was adjudged a bankrupt, he and his wife executed an instrument waiving and surrendering their right in the homestead and authorizing the trustees in bankruptcy to take possession and dispose of the same for the benefit of all the creditors. At a later date the trustees filed in the bankruptcy proceeding a petition asserting title to all the land, reciting the existence of the mortgages and other asserted liens, and praying that the 960 acres be sold free of all liens, that the proceeds be held by the trustees subject to the further order of the court, that all persons asserting liens on any part of the land be required to set them up by answer, that certain of the asserted liens be declared void and that as to the others the assets be marshaled. Acting upon this petition the court, with the assent of the parties in interest, directed that the land be sold as prayed, that all liens thereon be transferred to the proceeds and that the latter be held by the trustees for the payment of whatever liens or claims might be established against the same. The lands were sold, all liens found to be superior to the three mortgages were paid out of the proceeds and there remained a balance of $54,264.77,

which, although $13,683.94 in excess of what was required to pay the first mortgage, was insufficient to pay it and either of the others. Of this balance, $8,000 arose from the sale of the homestead. Moody & Son and the Century Savings Bank, both appearing in response to notice of the trustees' petition, asserted conflicting rights under their respective mortgages to a part of the proceeds. Although conceding that the first mortgage—that to Johnson—should be fully paid, they differed widely respecting the disposition of the proceeds of the homestead, Moody & Son asserting a right to have the same applied on the first mortgage and to receive on their mortgage whatever remained of the proceeds of the other land, and the bank asserting a right to have the first mortgage satisfied from the proceeds of the other land and to receive on its mortgage the proceeds of the homestead. Under the first contention Moody & Son would receive $13,683.94 and the bank nothing, while under the other Moody & Son would receive $5,683.94 and the bank $8,000. The bankruptcy court rejected both contentions and held that the proceeds of the homestead and those of the other land should be proportionally applied in paying the first mortgage, that the balance then remaining from the sale of the homestead, being $2,947.22, should be paid on the bank's mortgage and that the balance from the sale of the other land, being $10,736.67, should be paid on Moody & Son's mortgage. A decree was entered accordingly and the bank appealed to the Circuit Court of Appeals, which after overruling a motion challenging its jurisdiction, sustained the bank's contention and reversed the decree with instructions which were equivalent (see *Chesapeake & Potomac Telephone Co.* v. *Manning*, 186 U. S. 238, 240; *Metropolitan Water Co.* v. *Kaw Valley Drainage District*, 223 U. S. 519, 523) to directing a decree giving full effect to that contention. 204 Fed. Rep. 963; 209 Fed. Rep. 775. Moody & Son then appealed to this court.

Whether the Circuit Court of Appeals rightly sustained its jurisdiction turns upon whether this is one of those "controversies arising in bankruptcy proceedings" over which the circuit courts of appeals are invested, by § 24a of the Bankruptcy Act, with the same appellate jurisdiction that they possess in other cases under the Judicial Code, § 128, or is a mere step in bankruptcy proceedings the appellate review of which is regulated by other provisions of the Bankruptcy Act. If it is a controversy arising in bankruptcy proceedings the jurisdiction of that court was properly invoked, as is also that of this court. We entertain no doubt that it is such a controversy. It has every attribute of a suit in equity for the marshaling of assets, the sale of the encumbered property and the application of the proceeds to the liens in the order and mode ultimately fixed by the decree. True it was begun by the trustees and not by an adverse claimant, but this is immaterial, for the mortgagees, who claimed adversely to the trustees, not only appeared in response to notice of the trustees' petition, but asserted their mortgage liens and sought to have them enforced against the proceeds of the property conformably to the contentions before stated. This was the equivalent of an affirmative intervention and, when taken in connection with the trustees' petition, brought into the bankruptcy proceedings a controversy which was quite apart from the ordinary steps in such proceedings and well within the letter and spirit of § 24a. *Hewit* v. *Berlin Machine Works*, 194 U. S. 296, 300; *Knapp* v. *Milwaukee Trust Co.*, 216 U. S. 545, 553; *Teft* v. *Munsuri*, 222 U. S. 114, 118; *Houghton* v. *Burden*, 228 U. S. 161, 165; *Globe Bank* v. *Martin*, 236 U. S. 288, 295.

Coming to the merits, the matter for decision is the proper application or disposition of the proceeds of the 40 acres which the bankrupt and his family occupied as a homestead when the mortgages were given and up to the time of the waiver before mentioned. The homestead

right in this land was a creation of the statutes of the State, and therefore to determine what bearing this right had upon the validity and operation of the mortgages we must turn to those statutes and the decisions of the Supreme Court of the State construing and applying them. The statutes are found in the Code of 1897, and are as follows:

"Sec. 2972. The homestead of every family, whether owned by the husband or wife, is exempt from judicial sale, where there is no special declaration of statute to the contrary.

"Sec. 2974. No conveyance or incumbrance of or contract to convey or incumber the homestead, if the owner is married, is valid, unless the husband and wife join in the execution of the same joint instrument, whether the homestead is exclusively the subject of the contract or not, but such contracts may be enforced as to real estate other than the homestead at the option of the purchaser or incumbrancer.

"Sec. 2976. The homestead may be sold on execution for debts contracted prior to its acquisition, but in such case it shall not be sold except to supply any deficiency remaining after exhausting the other property of the debtor liable to execution. It may also be sold for debts created by written contract, executed by the persons having the power to convey, and expressly stipulating that it is liable therefor, but then only for a deficiency remaining after exhausting all other property pledged by the same contract for the payment of the debt.

"Sec. 2981. The owner may, from time to time, change the limits of the homestead by changing the metes and bounds, as well as the record of the plat and description, or vacate it, but such changes shall not prejudice conveyances or liens made or created previously thereto, and no such change of the entire homestead, made without the concurrence of the husband or wife, shall affect his or her

rights, or those of the children. The new homestead, to the extent in value of the old, is exempt from execution in all cases where the old or former one would have been."

Counsel are agreed that under these statutes the mortgages to Johnson and the bank, in which the wife joined, became valid liens on the homestead as well as on the other land; that the intervening mortgage to Moody & Son, in which the wife did not join, was void as to the homestead and became a valid lien only on the other land; that this mortgage remained void as to the homestead notwithstanding the subsequent waiver of the homestead right, and that its invalidity in that respect could be asserted by the bank as a subsequent mortgagee. We therefore come to the provision in § 2976 that the homestead, even where validly mortgaged, may be sold "only for a deficiency remaining after exhausting all other property" covered by the same mortgage. Whether only the mortgagors may claim the benefit of this provision, and they only while they retain the homestead, is the real point in dispute. Moody & Son insist that it merely confers on the mortgagors a personal privilege which they may exercise or waive as they choose, that in this instance the privilege was surrendered or terminated when the homestead right was waived and that in consequence the provision has no bearing on the proper application or disposition of the proceeds of either the homestead or the other land. The bank, on the other hand, insists that the right to have this provision followed is not strictly personal to the mortgagors but may be asserted by one to whom they transfer an interest in the homestead, such as a subsequent vendee or mortgagee, and that no act of theirs done after the transfer can prejudice the transferee in the exercise of this right. The solution of the question is not free from difficulty, but we are persuaded, as was the Circuit Court of Appeals, that in view of the decision of the Supreme

Court of the State in *Linscott* v. *Lamart*, 46 Iowa, 312, the bank's contention must be sustained.

The facts in that case, so far as now material, were these: One Ash owned 71 acres of land, 40 of which were his homestead. He and his wife mortgaged the entire tract to Lamart. Linscott subsequently obtained a judgment against Ash and purchased one-half of the tract at a sale under the judgment. Later Ash and his wife sold and conveyed the entire tract to Lamart, it being understood that this should not extinguish the mortgage. Lamart went into possession and Linscott brought a suit to determine the rights of the parties in the land. Lamart prevailed and the Supreme Court affirmed the decree, saying: "Ash and his wife had the right to sell and convey the homestead to Lamart, and he has the right to hold it exempt from judicial sale on plaintiff's judgment." And, after holding the sale under the judgment void because it included part of the homestead, the court further said: "What then are the rights of the parties? If Ash had not conveyed to Lamart, upon foreclosure of the mortgage, the homestead could only 'be sold to supply the deficiency remaining after exhausting the other property' included in the mortgage. Lamart paid Ash some $1,400 for the whole tract, being more than twice the amount of the mortgage. No fraud is charged or shown, and as he had the right to purchase the homestead and hold it as against plaintiff's judgment, he should now have the right to have the proceeds of the land, aside from the homestead, applied in payment of his mortgage, to the exclusion of junior liens. In other words, it would be inequitable to put him in a worse position than he would be if he had not taken the title from Ash. The plaintiff, by this rule, is left in precisely the same position he would now occupy if Ash were still holding his homestead, and Lamart his mortgage." Thus, under the influence of the provision in § 2976, it was ruled

that the mortgage, which embraced the homestead and other land, could be satisfied out of the latter to the exclusion of a junior judgment lien embracing the other land but not the homestead, and this although the mortgagors had sold the homestead and no longer had any right therein. This decision is more nearly in point than any other and we think it shows that the right to invoke the provision in § 2976 is neither strictly personal to the mortgagors nor wholly terminated by their waiver of the homestead right. Moody & Son place some reliance upon *Barker* v. *Rollins*, 30 Iowa, 412, and *Dilger* v. *Palmer*, 60 *Id.* 117, although conceding that the cases are not closely in point. We think they are without present bearing. In the former a purchaser of a mortgaged homestead, who thereafter made the land his homestead, claimed that this entitled him to have the mortgage satisfied from other unmortgaged property of the mortgagor, and the claim was denied, the court observing, 30 Iowa, p. 413: "*His* homestead was not within the contemplation of the parties to the contract sued on. The creditor might well be held to have contracted with reference to all the phases of homestead claimed by his debtor; but not as to any such claim by third parties, who should voluntarily purchase the property with full knowledge of the incumbrance upon it. They cannot intrude their rights upon the property to the prejudice of the creditor." In the other case a homestead was mortgaged with other land and the mortgagors thereafter sold the latter to a third person but retained the former. When it was sought to foreclose the mortgage, the mortgagors claimed that § 2976 entitled them to have the mortgage satisfied from the non-homestead property, which they had sold, and the claim was rejected, the court holding that by their sale of the non-homestead land they were estopped from insisting that it constituted the primary fund for the payment of the mortgage.

Concluding, as we do, that the Circuit Court of Appeals rightly applied the local statutes as construed by the Supreme Court of the State, its decree is

Affirmed.